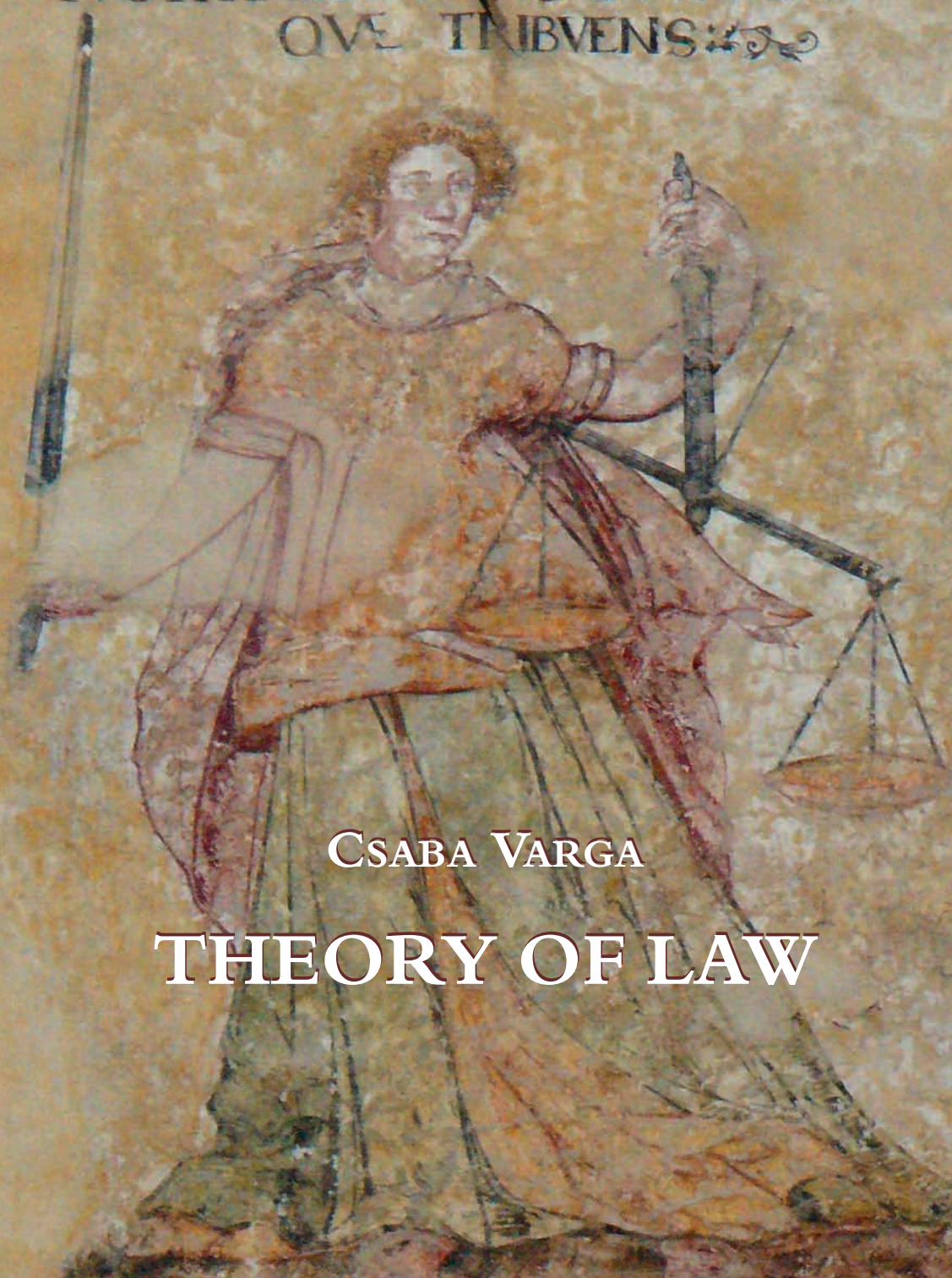


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CSABA VARGA

THEORY OF LAW

THEORY OF LAW

PHILOSOPHIAE IURIS

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THEORY OF LAW

Norm, Logic, System,
Doctrine & Technique in Legal Processes,
with Appendix on European Law

CSABA VARGA



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Allegoric Justice (1625) on the Mural of St. James' Church
at Lőcse/Leutschau/Leutsovia [now Levoča, Slovakia]
(photo by the author in 2008)

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(Conspectus Audientiae Camerae imperialis)
[Audience at the Imperial Chamber Court] (Frankfurt am Main, 1750)
from the Städtische Sammlungen Wetzlar

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ON PHILOSOPHISING
AND THEORISING IN LAW

LEGAL PHILOSOPHY, LEGAL THEORY – and the Future of Theoretical Legal Thought*

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1. Questioning and Knowing

Providing we had great truths indeed, they are not too many to change over time. In addition, I do believe there were and there are such. Nevertheless, the change of time does not so much concern the truth of something anyway, but rather—just as old recognitions live on in us too, so as to (when confronted to new problems) reveal new colours and connections, foreshadowing a deeper message—the enrichment and inner improvement of such truths, similar to the accumulation of experience in a lifetime (as concentric or nonconcentric circles), leading with new insights to incessantly renewing attempts at a synthesis momentarily taken.

2. Law and Philosophy

It is our comprehension that originates the legal phenomenon. It is our comprehension that locates and presents law in a given form of phenome-

* First published in *Acta Juridica Hungarica* 50 (2009) 3, pp. 237–252 & in <http://akademiai.om.hu/content/03_18830q86810656/fulltext.pdf>, abstracted in [IVR 24th World Congress: Global Harmony and Rule of Law {September 15–20, 2009, Beijing, China}] *Abstracts Special Workshops and Working Groups, II* (Beijing: Academy of Jurisprudence of China Law Society & China Legal Exchange Center 2009), pp. 11–12; originally presented in Hungarian at the workshop on “Theory of Law as a Discipline” at Szeged University on 3 February, 2006 and published as conference proceedings in *Jogelméleti Szemle* 2006/1 <<http://jesz.ajk.elte.hu/varga25.mht>> and in *Jogelmélet és önreflexió* [Legal theory and self-reflection] ed. Tamás Nagy & Zsolt Nagy (Szeged: Pólay Elemér Alapítvány 2007), pp. 39–48 [A Pólay Elemér Alapítvány könyvtára 16].

non. The same comprehension that lets us perceive law in our social milieu at a given level and in a given way will let us perceive legal philosophy at another level and in another way. This law and this legal philosophy may then enter into communication with one another at levels and in ways according to their relationship.

2.1. Law and Philosophical Wisdom

Conceiving the world as the outcome of conscious planning, we may indeed declare (following the Evangelist of the New Testament who expressed it in unique conciseness) that “In the beginning was the Word”.¹ On the other hand, relying on a rationalist explication founded on the mere empiricism of the laity of scholarship, on the basis of everyday experience we can contemplate a constantly renewing process of transforming our environment into increasingly complex structures through a series of self-organising artificial constructions.

In theology, on the one hand, law can from the outset be conceived of in the spirit of the human fulfilment of the work of Divine creation, as its application to human dimensions in implementation of the potentialities ordained by it. Or, we might even say that it is this theological philosophy itself that generates the law, by highlighting the former’s values when defining the various paths that may equally be followed within it.

However, on the other, approaching the issue from the opposite side, viewing it as one of the homogenisations necessarily arising on the terrain of the heterogeneity of our everyday existence, we obviously have to see in the development of legal homogeneity, in its strengthening and achieving social autonomy in more than one respect, some kind of a basically praxis-bound process, within which the piece of knowledge that reveals itself to those involved in general theoretical investigations directed at law is to embody the continuous rationalisation of the practical responses given to timely challenges. In the beginning, this rationalisation is probably only *s u b s e q u e n t* to actual developments at the most. However, after legal homogenisation is accomplished, it is certainly *p a r a l l e l* to them, and when, with conscious social planning and engineering (in brief: legal voluntarism), it comes to the fore and becomes exclusive, it is of a *d e t e r m i n i n g* force as well.

Ever since humans started philosophising about their world, they have also been reflecting on its order, on the latter’s potentialities and limits.

¹ <<http://scripturetext.com/john/1-1.htm>>.

In this sense, legal philosophy is of the same age as human societal self-reflection. It is by no mere chance that reasoning retrospectively, Greek philology has ever set the task for itself to reconstruct semantically—among others—the signs referring to the presence of some kind of law or legally relevant phenomena in the classical age, and designating them in one way or another, from the textuality of the available body of epic poems and from the mass of scattered linguistic fragments, in order to reconstruct those signs as contextualised by the contemporary worldview and underlying philosophy.² And since the time that all human endeavours have been added up to form some kind of formal law—whose archetypes can be encountered back in early legal formalisms (i.e., initiatives in the ancient Middle East and antique Greece and Rome, regarded today as primeval and analysed in modern reconstruction for the first time by Sir HENRY MAINE), albeit it began to achieve the level of its present-day domination from the reception of Roman Law, done first in Bologna, and in its most developed form as methodologically rigidified into doctrines, from the age of the codification of national laws in the 18th to 19th centuries³—, the positivity of the law (coming forward with a demand for acknowledgement of the law's reality as a fact) apparently conceals the underlying circumstance that behind the law as a reified structure functioning, so to speak, with a mechanical automatism, there are real human beings operating it, conditioned by their everyday lives, who have to assume this thoroughly responsible and responsive moral task with the strength of all their faculties and capacities.⁴

At the same time, a more or less regular “maintenance” is needed to make this everyday operation possible, which includes the law's cleaning (of useless parts and waste) and improvement (according to operational concepts and the need to prevent its degeneration into social dysfunction), and also the constant clarification of the foundations required for its long term strategic further development. It is in the fulfilment of this latter function that the theoretical thought directed to law becomes visible to us again.

² Cf., by the author, *Lectures on the Paradigms of Legal Thinking* (Budapest: Akadémiai Kiadó 1999) vii + 279 pp. [Philosophiae Iuris], para. 2.1.1–2, pp. 9 et seq.

³ Cf., by the author, *Codification as a Socio-historical Phenomenon* (Budapest: Akadémiai Kiadó 1991) viii + 391 pp.

⁴ In an own explication, spanning between the two end-poles of the evolvement of my personal line of thought from problem perception to a systematic explanation, cf., by the author, ‘Chose juridique et réification en droit: contribution à la théorie marxiste sur la base de l’Ontologie de Lukács’ in *Archives de Philosophie du Droit* 25 (Paris: Sirey 1980), pp. 385–411, on the one hand, and *Lectures...* [note 2], on the other. See also, in an American context start-

2.2. *Appearances of Modern Formal Law*

Regulation by law always takes place with the aim of pre-defining an unspecified and unforeseeable future and, thus, in view of granting itself an eternal validity. We know, nevertheless, that the routine arising from this is always temporary: after a certain period of time, the rules will inevitably be surrounded by a divergence from the rules (in form of exceptions), which sooner or later results in the formulation of new, more detailed rules. Behind the relative permanence of the legal form, there are opposing interests pressing against each other, to be squeezed into, while being solved in, it. They continuously address—while questioning—the given form. Meanwhile, they render it liveable, by re-assessing its contents through its practical interpretation—extending, narrowing, or just re-shifting its scope. Or, jurists must reason in terms of alternativity, searching for a suitable form, while the due form eventually found, crystallised as adjusted to the given task, becomes itself a *donné* for the next challenge, to be further formed and, thereby, also to be transcended, albeit at the same time it remains the basic assurance of the continuation of the same cultural framework for legal problem-solving, that is, of the continued respect for traditions in patterning and being patterned alike.

We might say that, firstly, *positive regulation*, secondly, the *Rechtsdogmatik* (elaborating conceptual contexts based on the generalisation of past practice and, thereby, demarcating its ways open towards the future) as well as, thirdly, *doctrine* (laying the theoretical foundations of the given branches of regulation) collectively constitute only a few fundamentals for legal practice. Of course, all this is scarcely visible in those thoroughly technicised and profoundly reified cultures in which law is rigidified into routines (as enclosed in) to the extent of becoming alienated itself; where a mass of juridified relationships, procedures and activities may require the intervention of professional management by legal technicians on a mass scale; and when our whole lives are almost entirely surrounded and mediated by various agencies of enterprise, trade and traffic, with standards reproduced in mass proportions. Well, such cultures are permeated with a constantly growing mass of formulas and thesauruses that have been generated, which then come to be

ing from leftist critical deconstructionism of the Critical Legal Studies, by William A. Conklin, 'Human Rights, Language and Law: A Survey of Semiotics and Phenomenology' *Ottawa Law Review* 27 (1995–1996) 1, pp. 129–173 and *The Phenomenology of Modern Legal Discourse* The Judicial Production and the Disclosure of Suffering (Aldershot, etc.: Ashgate 1998) xii + 285 pp.

broken down to procedural *moduses*, and subsequently generalised into blocks of schemes, only to be ultimately overfilled by interpretations interpreted and comments incessantly commented upon. As is well known, all this takes place in view of the advancement of standardisation, implying extension to new fields, expansion in depth and details, as well as both application to relations altered in the meantime and, as a feed-back, re-consideration of the *ratio* underlying the given regulation. In our modern formal culture, it is all this that constitutes the medium of law-application, providing its standard framework and serving as its unceasing renewal, that is, a constant *Aufhebung* transcendence in preservation of this unbroken process.⁵

These reified structures suggest an approach in terms of language use and communication, that is, an autotelism and a self-propelling mechanism that, in a constantly broadening way, reproduce earlier well-devised potentialities and paths covered as practices, or forms, of human activity, definitely specified. For their phenomenal form—namely, the *c o n c e p - t u a l i s a t i o n* of their culture—does conceal the creativity of human intellect, while still, nevertheless, operating in it, that is, the practical aspiration to respond to new challenges at any time and, thereby, of course, also the need for a humane coverage behind the human response and the irrevocable responsibility to be borne for the consequences as well.

The object of theoretical jurisprudence seems to have become invisible meanwhile, in this enchantment. But it is certainly there, in a three-fold sense at least. Firstly, it presents itself *e v i d e n t l y* in strategic planning and decision-making, when we search the future or change this conceptualised culture as a result of new situations or modified recognitions. For intellectual constructions as considerations behind the formalistic pillars maintaining the appearance of routine need to be re-activated when, due to actual imperfections in regulation (even if with the appearance of formalistic automatism preserved), an original evaluation is taken in the form of a decision—either so gaps can be filled in law or in the classical cases of discretion. Secondly, germs of theoretical thinking are actuated *n o n - e v i d e n t l y* in everyday routine when we conceal our consequence-oriented practical reasoning by seemingly un-problematic sequences of derivation in legal decision-making, leaving the job to a subsequent analytical reconstruction that reveals that nothing but a choice between alterna-

⁵ Cf., by the author, 'Doctrine and Technique in Law' *Iustum Aequum Salutare* [Budapest] IV (2008) 1, pp. 23–37 & <<http://www.jak.ppke.hu/hir/ias/20081sz/02.pdf>>.

tives was actually to take place. And thirdly, naturally, we cultivate theoretical jurisprudence and use its results when, applying it to our situation, we offer a scholarly explanation of our societal world.

2.3. *Differentiation in Complexity*

The natural, societal and intellectual worlds of man constitute a kind of unity and continuity. Our natural environment is given even if we have altered it. The societal milieu around us has been brought about by the endless series of conventionalisations through generations (so we are, in fact, socialised to it as to something readily given, even if we constantly re-form it by our reconventionalising contributions). At an intellectual level, we approach these at a critical distance but with our specific judgement added. In the final analysis, there are tendential correlations prevailing in the triad of humanity's natural, societal and intellectual worlds, as the most varied impulses and recognitions, creative efforts and practical feedbacks that, flowing incessantly, are to bring about a state of equilibrium in any society, if viewed from a historical perspective. Anything that can be formed will eventually be formed in fact. This applies equally to our natural world and our concept of it,⁶ the way our social institution-alisation works by fulfilling its function, and also to our intellectuality in all of this, forming them and being formed by our experience day to day. Neither a value judgement nor any approval is involved, only that a fact is established if we ascertain now that the complexity of our social existence has brought about a compound, internally so articulated in historical time, also that a process of the *Ausdifferenzierung des Rechts*⁷ has taken place in it, in the major part of civilisations and cultures at least. Our social objects, reified practices and alienated products are all embodied by objectifications that we have to consider—*nolens, volens*—as part of our societal world, to be treated as independent subjects of cognition.

⁶ John Lukács mentions a noteworthy example in his *At the End of an Age* 2002 in Hungarian translation *Egy nagy korszak végén* (Budapest: Európa Könyvkiadó 2005), on p. 128, note 80, related to the change of the cultural landscape of the Swiss mountains, describing how it developed from bleakness too dreary for life to a serene charm of prosperity, which the author attributes to the change in human understanding in the meantime and to their human habitation, based first of all on societal adaptation to the milieu.

⁷ Cf. Niklas Luhmann *Ausdifferenzierung des Rechts* Beiträge zur Rechtssoziologie und Rechtstheorie (Frankfurt am Main: Suhrkamp 1981, ²1999) 456 pp. [Suhrkamp-Taschenbuch Wissenschaft 1418].

Law? This is something prevailing and operating, with a place firmly demarcated by universally shared social conventions in our everyday life. Apparently, it separates from anything else solidly like a rock, and only a theoretically deconstructive reconstruction can prove after the fact that, in the ultimate analysis, law is hardly more than a manner of speech, specific communication or a game collectively played. This is all that can be taken as real—inasmuch as it is actually used as a basis of reference.⁸ However, according to the law's own rules of the game, such a specific (legal) communication presupposes from the outset that such references are actually made at every major crossroads and at each new start. And the extent to which such references can be made at all is delimited by so-called *v a l i d - i t y* in that order of speech. And validity covers the field generated according to this very rule of the game.⁹

3. Conclusions

First of all, two substantial conclusions ensue from all this. Both might have already been obvious decades ago. However, they are elucidated with proper sharpness only because our age involves so many dangers and threats. Finally, a third conclusion can also be drawn from these, based on some tendencies already visible in our present.

3.1. *Legal Philosophising Reduced to Discourse-reconstruction*

As can be seen, legal theorising starts above all by rendering problematic that which may appear unproblematic in everyday life, that is, when we question the seemingly self-evident, notably, the why and wherefore of the judicial routine's alleged rule-conformism—with proper impoliteness and irreverent disrespect of tradition. Well, it is this—namely, the systematic

⁸ As known, Scandinavian legal realism did the most for having this realised. Cf., e.g., *Scandinavian Legal Realism* ed. Antal Visegrády (Budapest: [Szent István Társulat] 2003) xxxviii + 162 pp. [Philosophiae Iuris] and, as a background, by the author, 'Skandináv jogi realizmus' [Scandinavian legal realism] in *Jogbölcselet XIX–XX. század: Előadások* [Lectures on 19th to 20th century philosophy of law] ed. Csaba Varga (Budapest: Szent István Társulat 1999), pp. 81–91 [Bibliotheca Cathedrae Philosophiae Iuris et Rerum Politicarum Universitatis Catholicae de Petro Pázmány nominatae].

⁹ Cf., by the author, 'Validity' *Acta Juridica Hungarica* 41 (2000) 3–4, pp. 155–166 {& <http://www.situation.ru/app/j_art_724.htm> &<<http://www.ingentaconnect.com/content/klu/ajuh/2000/00000041/F0020003/00383612>>}. }

cultivation of heretical incredulity that may in principle arise in any participant of the so-called judicial event, if organised into a grand-theory—that goes on nowadays mostly under the aegis of professional legal theorising. What I have in mind here is a kind of contrast. For, just a few decades ago, we inquired—solemnly and seriously—into the “epistemology and methodology of law”, the “theory of jural relations” and the law’s voluntary nature, as well as all kinds of other labels and features attributed or related to law; just as, first, the biophysicist, then, the biochemist approach the (animal/human) body, only to hand over their symbolic lancet to the anatomist, and finally to the pathologist, enabling each of them to cut out what they need; with the presumption that all we had thought about it also had to be seen in both the living and the dead. In such a corporeal view of law, muscles may have creaked and sinews and bones rubbed at the most; still the body as such could function. Well, in contrast to the forceful articulation of such a splendid simple-mindedness—*sancta simplicitas*—, what we do today is at the most to break forms and differentiate according to qualities related or ascribed to law in our speech acts. For what we do here is analysis: we operate concept with concept and lift it (as latter-day followers of baron Munchausen) out of what is itself, in order to finally place it back into what is again just itself. Instead of the old-fashioned, static dissection of the law’s allegedly discrete (i.e., separately examinable) composing parts, we now make a theory out of what we once were prudently reluctant even to notice. As a somewhat bizarre example, this is as if, in athletics (and due to some strange motive), we suddenly started to concentrate—instead of on efforts or the implied aesthetics—on the body’s urinary output or perspiration curves, that is, on the so-far concealed problem of how the judge can proceed by means of steadily manifesting the appearance of being logical when the inference that is practical anyway is anything but logical.

This change in character shows clearly that we are more fashion-conscious than we had thought ourselves to be, at least in one sense of the word. Notably, our interest in any given subject (including the underlying selection made) is also promoted by the trends of the age. Today, the question is raised not in terms of “*what?*” but in terms of “*in spite of all that: in what way?*” For, we do not see a naturally given *donné* in the subject but a virtual construction to be deconstructed. In reality, we cut pieces from our subconscious under the microscope. We boast of being quite detached in scholarship while we have become narcissistic self-dissectors in practice. The spirit of our age focuses as to contemporary theo-

retical jurisprudence not only on the issue of “how?” but has, all of a sudden, created a human reflex or conceptual relation out of yesterday’s interconnection of independent entities. So, we do search for phrases and frequency in linguistic practice (i.e., the preliminaries supposed to be sensible of a seemingly sensible statement) in the law—instead of inquiring as to its “reality” earlier believed to exist.¹⁰

All this is not turning grey but is a projection of, or mental reaction to, the change of the very subject of cognition as a socially generated objectivation.

3.2. *The Query for Natural Law Unresolved*

The other conclusion relates to the prerequisite of such a practice, to the question of whether or not the law has the exclusive criterion of a *validity* exhausted by formal proceduralism (preconditioned by some factually empirical and quantifiable *efficiency*), and whether or not any other factor (aspect or feature) can have any similar criterion-setting role. Providing that the law of our modernity has indeed developed in this way (i.e., in autonomous disconnection from other factors of social complexity, resulting in the law’s separation from its framework environment basically defined by *theologicum* and *ethicum*, permeating and eventually also dominating all forms of human attitude within the *ordo* of our social milieu), then obviously the social complexity’s qualities and *imperativum*, having once constituted the *sine qua non* condition of their minimum contents, also will vanish from what can by now be rightly called *modern formal law*.¹¹ In this case, what is left of the feasibility of an axiological approach to law? It would be too little comfort to say that value-dependent approaches are unchangingly given free scope in legal policy [*Rechtspolitik*] and the theory of legislation [*Gesetzgebungslehre*] as well as in the doctrine of law-application [*Rechtsanwendungslehre*], re-arranging the alternative options (implying the moment of an independent *decisio*) into a unidirectional logical sequence of inference both verbally and culturally (as

¹⁰ As a background, cf., by the author, ‘Theory and Practice in Law: On the Magical Role of Legal Technique’ *Acta Juridica Hungarica* 47 (2006) 4, pp. 351–372 {& <<http://www.akademiai.com/content/j4k2u58xk7rj6541/fulltext.pdf>>}.

¹¹ Cf., by the author, ‘Moderne Staatlichkeit und modernes formales Rechts’ *Acta Juridica Academiae Scientiarum Hungaricae* 26 (1984) 1–2, pp. 235–241 and ‘The Basic Settings of Modern Formal Law’ in *European Legal Cultures* ed. Volkmar Gessner, Armin Hoeland & Csaba Varga (Aldershot, Brookfield USA, Singapore, Sydney: Dartmouth 1996), {introduction to Part II: The European Legal Mind} pp. 89–103 [Tempus Textbook Series on European Law and European Legal Cultures 1].

the latter does not necessarily raise awareness of the discretionary power that is made to work there by decision-makers anyway).

Regarding the, so-to-speak, permanent conflict between natural law and legal positivism,¹² we can only ascertain that the former is increasingly losing ground up to the point that we cannot now think of this opposition otherwise than as the symbolic expression of the challenge since classical times (from ancient Greeks, via Romans and the Medievalists, to early modernity) to break away from the one-time role of *ancilla theologiae* to achieve the *renaissance* of human quality, practically transplanted onto our earthly order as well. Otherwise speaking, the respect for human interests (with sheer utility in focus) in *praxis* has found a most promising terrain in the meantime. And irrespective of whether there is still monarchy or representative democracy has already been invented, the law itself has finally become optional, scarcely differing from the characterisation set out in the *Communist Manifesto* one and a half centuries ago: a will made dominant through having been wrapped into state-controlled formalities.¹³ And, thereby, the desirability of linking the quality of right with the right¹⁴ is smoothly transferred into an issue of mere intellectuality and only for highbrows' use. In other words, having arrived at modernity, our societal world has also separated from our intellectual world. For, in a criterion-like way, the law itself has become value-free (or, properly speaking, value-neutral), not followed (or only hesitatingly followed) due to lawyers' professional ideology itself having become value-free or even cynical.¹⁵

We know from the research of a Hungarian-American Benedictine friar science historian¹⁶ that the history of science can explain the separation of CHRISTianity and Islam (with the evolutionary ability of the very idea of

¹² See, e.g., *Natura iuris* Természetjogtan & jogpozitivizmus & magyar jogelmélet [Natural law & legal positivism & Hungarian legal philosophy] ed. Miklós Szabó (Miskolc: Bíbor Kiadó 2002) 249 pp. [Prudentia Juris].

¹³ Cf., e.g., by the author, 'Marxizmus' in *Jogbölcselet* [note 6], pp. 24–32.

¹⁴ See Sebastião Cruz *Ius. Directum* (*Directum*) Dereito (derecho, diritto, droit, direito, Recht, right, etc.) 7.a ed. (Coimbra: [Gráfica de Coimbra] 1986) 58 pp. and Jesús Lalinde Abadía *Las culturas represivas de la humanidad* (H. 1945) I–II (Zaragoza: Prensas Universitarias de Zaragoza 1992), as well as Ferenc Kovács *A magyar jogi terminológia kialakulása* [The evolution of Hungarian legal terminology] (Budapest: Akadémiai Kiadó 1964) 206 pp. [Nyelvészeti tanulmányok 6].

¹⁵ For its ontological and epistemological interrelations, see, by the author, *The Place of Law in Lukács' World Concept* (Budapest: Akadémiai Kiadó 1985) 193 pp., in particular ch.VI, para 4.

¹⁶ Szaniszló Jáki *A természettudomány eredete* [Lecture on the origin of natural science] (Győr: Keresztény Értelmiségiek Szövetsége Győri Szervezete 1993) 15 pp. in general, and, by Stanley L. Jaki, *The Origin of Science and the Science of its Origin* (Edinburgh: Scottish Aca-

scientia emerging exclusively from the former's culture) by the fact that theological debates after the turn of the First Millennium had already declared the chance of our fallibility on earth, that is, that our Earth has indeed been made our possession, and our actual life our eventual fate, as Divine Providence is not to interfere with either the laws created in our world or our irrevocable choices between good and bad. Or, neither genuine ontology nor human anthropology (with the chance of humanity's fall into sin) is excluded by far as true scholarly fields. Thereby, it is possible to formulate repetitive regularities as laws, and human striving for their cognition and honest actions within their terms are not faint-heartedness but rather the fulfilment of an assignment from the Creator. On the other hand, this awareness, born in Europe around the 11th to 13th centuries and which allowed us to live happily in our world and ensured the subsequent *renaissance*—that is, the relative separation of the spiritual from the natural world—, has not been repeated so obviously in societal and intellectual aspects.

Just to refer to some great decisive events: for example, the great classical periods of *n a t u r a l l a w* became, as it moved towards modernity, replaced by new constructs. However, the long-standing requirement of justification by natural law, on the one hand, and the frightening desolateness of the gap left after it was ousted from the proper terrain of law (with its space filled only by legal voluntarism), on the other, prevented the issue from being closed down entirely forever.¹⁷

The lack of a theoretical response re-appeared in a new light when, within the critical perspective of the *S o c i a l D o c t r i n e o f t h e C h u r c h* in the immediate present, the classical spiritual power raised its voice at last and started to speak up against the dehumanising dysfunctionality of the social and economic arrangements of the Western world. For it is obvious that the Gospel does have a message in general, but the question of what the indubitability of natural law (to the extent it can be

demic Press 1978) viii + 160 pp. & *The Road of Science and the Ways of God* (Edinburgh: Scottish Academic Press 1978) vi + 478 pp. as well as *Jesus, Islam, Science* (Pinckney, Mich.: Real View Book 2001) 32 pp. in particular.

¹⁷ In his oeuvre, Michel Villey analysed the process repeatedly in his *Leçons d'histoire de la philosophie du droit* nouv. éd. [1957] (Paris: Dalloz 1962) 318 pp. [Philosophie du droit 6], *Seize essais de philosophie du droit dont un sur la crise universitaire* (Paris: Dalloz 1969) 370 pp. [Philosophie du droit 12] and *Critique de la pensée juridique moderne* (Douze autres essais) (Paris: Dalloz 1976) 275 pp. [Philosophie du droit 16], as well as in his magisterial lecture notes on *La formation de la pensée juridique moderne* rév. Stéphane Rials (Paris: Presses Universitaires de France 2003) 624 pp. [Léviathan].

so characterised) really means for positive law has not been answered reassuringly ever since the age of Saint THOMAS AQUINAS. Anyway, the commitment of our life on Earth does not allow us to handle ourselves, our societal surroundings or the order to be made on earth with the indifference characteristic of laws built into physicality and with a demand for total autonomy. As is well known, the social teaching of the Church obviously derives its arguments from the Gospel, but it does so through interpretation embedded into theological hermeneutics of the ages given at any time, combined with a striving to give a temporal answer adjusted to the situation *hic et nunc*, i.e., with a kind of optimisation of the expectations (conceived of as best) of the society and culture behind the actual teaching.¹⁸

Finally, the barbarity of the last century, then the debasement of person against person followed by the technocratic emptying of our future, accompanied by the unlimited exploitation of our planet's reserves, that is, the ideocracy of socialism being replaced by the all-covering pragmatic homogenisation through globalism — along with the general mood of some ultimate scenario of *finita la commedia!*¹⁹ — have since World War II repeatedly raised the query of how to render the law autonomous. Well, the legal accountability for Nazi-type depravity (the so-called RADBRUCH-formula), the possibility to rebuild civil conditions in relative freedom from codal restrictions (*“die Natur der Sache”*), then, most pressingly nowadays, the unsolved issue of Latin American and other disintegrating failed societies, the squandering of our Planet's resources using up humankind's future, the anti-human usability of the possibility of immeasurable manipulation generated by the newest technologies, the ultimate degradation of the Western world through an internal moral split of dual standards, enforced by diverging interests, and last but not least, the destructive dysfunctions arising from the universalisation of the Atlantic legal mind and US state-craft (as extended espe-

¹⁸ The author referred to in the previous note struggled with the issue recurrently. He concluded that Saint THOMAS AQUINAS had already considered the very notion of practice-bound secular laws as something separate, considering the fact that neither the Gospel nor any conception of natural law would be capable (or competent) to cover it throughout and directly. See Michel Villey *Questions de Saint Thomas sur le droit et la politique* ou le bon usage des dialogues (Paris: Presses Universitaires de France 1987) 185 pp. [Questions], as well as, as fragments from him, *Les Carnets Réflexions sur la philosophie et le droit*, éd. Marie-Anne Frison-Roche & Jamine Christoph (Paris: Presses Univesitaires de France 1995) xv + 542 pp.

¹⁹ “The show's over.”

cially to the Eastern European regions and so-called developing societies, exposed to the imperialism of the American movements of Law & Modernisation and Law & Development)—all these call for some kind of external objective measure.²⁰

Albeit we have to know that a revival of natural law in our day cannot target more than the expansion of sensitivities and the extension of the range of topics and aspects of investigation, with their re-integration into our culture. Otherwise speaking, it cannot claim a new deduction [*Ableitung*] or subordination [*subordinatio*], as this would lead back again to a pre-scientism. Therefore, the question is partly open, waiting for both a response and a foundation in theory.

3.3. Positive Law – Without Legal Positivism?

As was pointed out earlier, things are mostly interconnected, and it is only due to a lack of perspective if we cannot perceive latent correlations for the time being. Well, our earlier thesis on the change of focus of theoretical legal thinking in the past few decades was largely due to the metamorphosis of our world-view in the philosophy of science, a circumstance that may explain the tendency of law to have become increasingly immaterial, to be taken as hardly more than a discursive process within the frame of specific communication²¹—such a thesis by no means supplies a sufficient (let alone exhaustive) explanation. It has been discernible in both the description of the Western European and Atlantic legal world²² and the design of the common codification of private substantive and procedural law in the

²⁰ Some cardinal aspects are analysed in a pathbreaking concise overview by the present pope, then Cardinal Joseph Ratzinger, in his *Crises of Law* [an address delivered on the occasion of being conferred the degree of Doctor *Honoris Causa* by the LUMSA Faculty of Jurisprudence in Rome on November 10, 1999] in <http://www.ratzinger.it/conferenze/crisideldiritto_eng.htm>. As to actualities in the region, cf., by the author, *Transition to Rule of Law On the Democratic Transformation in Hungary* (Budapest: ELTE “Comparative Legal Cultures” Project 1995) 190 pp. [Philosophiae Iuris] and *Transition? To Rule of Law? Constitutionalism and Transitional Justice Challenged in Central & Eastern Europe* (Pomáz: Kráter 2008) 292 pp. [PoLiSz Series 7].

²¹ See para. 2.1.

²² E.g., by the author, ‘Meeting Points between the Traditions of English–American Common Law and Continental–French Civil Law (Developments and Experience of Postmodernity in Canada)’ *Acta Juridica Hungarica* 44 (2003) 1–2, pp. 21–44 {& <<http://www.akademiai.com/content/x39m7w4371341671/?p=056215b52c56447c8f9631a8d8baada3&pi=1>> & <<http://www.akademiai.com/content/x39m7w4371341671/fulltext.pdf>>}. }

European Union²³ (requiring Hungarian participation as well from now on) that—starting from the era of Western rebuilding after the Second World War²⁴—it is the resolution of the exclusivity of the law's positivity (or being posited) that has been increasingly reckoned with. All this is palliated with fashionable liberal catch-words, labelled as democratisation of, participation in, and multi-factorialisation of the legal process. If, and insofar as, this resolution becomes dominant (as prognosticated by American macro-sociological grand-theories for decades now²⁵), it will also obviously increasingly eliminate the alienating effect of the special modes of speech and culture of communication that may still have made the impression of being self-propelled in law and that have successfully ousted both pragmatic and evaluative reasoning from routine procedures, reducing them to mere pattern-following.

Accordingly, philosophical reflection on law with expectations of theory-building is anything but a memory of the past. It is by far more an agenda addressing the future. Legal philosophising is going to become part of such a legal culture in constant formation.²⁶ That is, what we will then call law will define or demarcate its object together with what we think of it with good reason and conclusive force. We shall presumably remember legal philosophy up to the end of the 20th century as an interesting but mostly dated preliminary that undertook the task of founding (at a mega-level of science philosophy and science methodology) the science of the

²³ E.g., by the author, 'La Codification à l'aube du troisième millénaire' in *Mélanges Paul Amselek* org. Gérard Cohen-Jonathan, Yves Gaudemet, Robert Hertzog, Patrick Wachsmann & Jean Waline (Bruxelles: Bruylant 2004), pp. 779–800 & 'Codification at the Threshold of the Third Millennium' *Acta Juridica Hungarica* 47 (2006) 2, pp. 89–117 {& <<http://www.akademiai.com/content/cv56191505t7k36q/fulltext.pdf>>}.

²⁴ In an edifying comparison with Central and Eastern European peripheries, see, above all, Zdenek Kühn 'Worlds Apart: Western and Central European Judicial Culture at the Onset of the European Enlargement' *The American Journal of Comparative Law* 52 (2004), pp. 531–567.

²⁵ First of all, e.g., Philippe Nonet & Philip Selznick *Law and Society in Transition* Toward Responsive Law (New York, etc.: Harper & Row 1978) vi + 122 pp. and Roberto Mangabeira Unger *Law in Modern Society* Toward a Criticism of Social Theory (New York: The Free Press 1976) ix + 309 pp. As a contemporary reflection on these, see, by the author, 'Átalakulóban a jog?' [Law in transition?] *Állam- és jogtudomány* XXIII (1980) 4, pp. 670–680.

²⁶ Albeit "cultural lags" are too well known here as well. Cf., e.g., by the author, 'What is to Come after Legal Positivism? Debates Revolving around the Topic of »The Judicial Establishment of Facts«' in *Theorie des Rechts und der Gesellschaft* Festschrift für Werner Krawietz zum 70. Geburtstag, hrsg. Manuel Atienza, Enrico Pattaro, Martin Schulte, Boris Topornin & Dieter Wyduckel (Berlin: Duncker & Humblot 2003), pp. 657–676.

law that, in addition to positive analyses of a *Rechtsdogmatik*, dissected the law into parts—as a researcher examines an insect on his table or liquids in retorts, to be able to inspect each of its methodically separated components individually. It is conceivable that—as usual—primarily those moments from this philosophising that might have contributed to the precise transcendence of this all will survive memorably for posterity.

The triad of the HEGELian thesis / antithesis / synthesis may prove to be rather too attractive. All that notwithstanding, I cannot ignore, by formulating my suspicion, that it will be a kind of repeated encounter, moreover, a reunification of the *s o c i e t a l* and the *i n t e l l e c t u a l* (referred to already several times) that will again re-occur in the legal philosophy of the near future. The aforementioned catch-words of the resolution (or dissolution) of the law's positivistic self-definition themselves seem to refer to something like this. The realm of values behind the law, demanding their re-integration in transcendence, also suggests something similar. Man is to return to himself (as I formulated somewhat lyrically in conclusion to my treatment of the law's paradigms twenty years ago²⁷), and theoretical thinking built on philosophical reflections may be the most adequate avenue to bring this about.

²⁷ “We followed a path that led to law from the paradigms of legal thinking, and from the self-assertion of legal formalism to its overall cultural determination. Yet, our human yearnings peeked out from behind the illusory reference of our security and we could discover reliable, solid grounds only in the elusive continuity of our social practice. In the meantime it proved to be a process which we had thought to have been present as a material entity and what we had believed to be fully built up proved to build continuously from acts in an uninterrupted series. What we have discovered about law is that it has always been inside of us, although we thought it to have been outside. We bear it in our culture despite our repeated and hasty attempts at linking it to materialities. We have identified ancient dilemmas as existent in our current debates as well. We have found long abandoned patterns again. We have discovered the realisations of common recognitions in those potentialities and directions in law which we believed to have been conceptually marked off once and for all. / However, we have found an invitation for elaboration in what has revealed itself as ready-to-take. Behind the mask, and in the backstage, the demand for our own initiation, play, role-undertaking and human responsibility has presented itself. We have become subjects from objects, indispensable actors from mere addressees. And, we can be convinced that despite having a variety of civilisational overcoats, the culture of law is still exclusively inherent in us who experience it day by day. We bear it and shape it. Everything conventional in it is conventionalised by us. It does not have any further existence or effect beyond this. And with its existence inherent in us, we cannot convey the responsibility to be borne for it on somebody else either. It is ours in its totality so much that it cannot be torn out of our days or acts. It will thus turn into what we guard it to become. Therefore, we must take care of it at all times since we are, in many ways, taking care of our own.” Varga *Lectures...* [note 2 {first Hungarian ed. in 1997}], ch. 7, p. 219.

4. On What the Stake is

We live in a dangerous age. These dangers include the saturation of our environment with poisons, both in nature and in our societal world, as much as in our intellectuality—freed of standards, endangering mental survival itself. Forces ready to act are nowadays making experiments by erecting a new and idea-controlled brave new world, and our perennial cultural diversity, homogenised in a global village, is being visualised by some as already accomplished.²⁸ In one of the richest (yet in many respects most innocent) parts of the world, the future is feared as bringing with it commercialisation of legal education and scholarship, with the results of legal research being ordered in advance as ready clichés to justify whatever policies are desired. Such a resignation to predestination by fashionable global policies may emerge that finally we shall sink into, dragging like superannuated spinsters, a wretched life, drawing on what it may have left.²⁹

There are several signs indicating that situations are always double-faceted. Now we cannot conclude more from such a threat than that it can also be beneficial to be a local on the peripheries.

²⁸ C.f., e.g., in representation of two poles, *Zum 80. Geburtstag von Hermann Klenner* (Berlin: trafo 2006) 173 pp. [Sitzungsberichte der Leibniz-Sozietät e.V. 85] {Joachim Herrmann, Gerhard Sprenger & Hermann Klenner, pp. 1–55}, on the one hand, and *The Governance of Globalisation* The Proceedings of the Ninth Plenary Session of the Pontifical Academy of Social Sciences (2–6 May 2003) (Vatican City: Pontifical Academy of Social Sciences 2004) xxxv + 403 pp., on the other.

²⁹ For example, according to the cry for help by an author not inclined to pessimism otherwise, “L’enseignement sera une marchandise.” There may scarcely be other chance than “se vendre pour rester des facultés de droit dignes de ce nom, ou refuser de se vendre et vieillir comme des vierges stériles.” (p. 16) “[L]e travail scriptuaire universitaire [...sera...] se concrétiser comme «fournisseur de prémisses» justifiant toujours une quelconque politique ou une orientation idéologique” (p. 17). The perspective therefore is hardly more than “l’exploitation de la recherche [...] pour obtenir une légitimation, une justification des politiques étatiques ou de l’industrie.” (p. 18) Bjarne Melkevik ‘Scolies sur le futur des facultés de droit’ *Le verdict* Audi alteram partem [Journal de la Faculté de Droit de l’Université Laval, Québec], 4 (décembre 2005) 4, pp. 14–19.

LEGAL ONTOLOGY*

Legal ontology (metaphysics) is the philosophical investigation into the existence (or substance) of law. Legal ontology receives its actual meaning and significance when distinguished from the law's epistemological analysis.

In ancient and primitive societies (in which the separation, laicisation, and formalisation of the law had not yet occurred), the law's substance was seen as a unity between ideality and reality. Historically, in the Graeco-Roman ideal of *to dikaion* [the just], law is the *just thing itself*, the concrete justness of the concrete case, which, as a *medium in re* [medium within the thing], is hidden in the things themselves, although its identification can only be achieved by citizens through their own communities. As survivals of this past, anthropology often uncovers ideas of law in stateless societies in which customs, contracts, and laws still form an undivided unity. Customs are normative expectations and description of the *status quo*, contracts record the convention actually reached, and laws reflect the decision taken by the community.

Polarisation results from attempts at conceptualising law and reducing it to the ruler's enactment. *Lex* [law] is also distinguished from the formerly undifferentiated domain of *ius* [right]. As compared to *to dikaion*, this is a change in *ius*. For, in the notion of the *ius*, the behaviour resulting in the *justum* [just] becomes the core element of the concept; emphasis is thereby shifted from the thing itself to its *recognition and realisation*. Similarly, in the notions of *Recht*, *right*, *droit*, *diritto*, the behaviour embodying the *rectum* receives emphasis. In the case of the notion of *lex* (with the meanings of *λεγω* such as *colligo* [gather], *dico* [tell] and *loquor* [say]), the emphasis is put on "what has been said" and "what has been collected". Thus, the earlier consideration is re-asserted, according to which the standard inherent in the thing is not enough, and any genuine standard can only be found through *searching for righteous human behaviour*.

* In its first version, 'Ontology, Legal (Metaphysics)' in *The Philosophy of Law An Encyclopedia*, ed. Christopher Berry Gray (New York & London: Garland Publishing 1999), pp. 617–619 [Garland Reference Library of the Humanities, 1743] & in <<http://www.scribd.com/doc/45731906/Encyclopedia-of-Philosophy-of-Law-Vol-2>>.

European legal culture has been long dominated by voluntarism. First, by its expression of will, the strongest social power opposes itself to the law inherited as a tradition (i.e., the *gutes, altes Recht* [or ‘the good, old law’]), then starts to control it, and finally ends up dominating it. Thereby, the quality of ‘legal’ is eventually reduced to the arbitrary act embodied in the sovereign enactment. The understanding of law as a rule becomes separated from upright conduct. Any rule can become legal if given a posited form. Legal positivism teaches the exclusiveness of *p o s i t i v e l a w*: it is positive because of being posited, that is, enacted through the due procedure in the due way and form. This reduces the *ius* to the *lex*. English legal culture has always found conceptual dichotomy, or polarisation, with axiomatising pretensions to be alien to its spirit. Even the statutory law is not accepted as the denial or overcoming of the idea of *ius*, but rather as a natural corollary to it. As a survival of the ancient tradition, sometimes the *n a t u r a l l a w* is set against the positive law as its standard and limitation in various ways and with varied success.

Throughout the thousands of years of legal history, a number of trends in legal ontology and metaphysics were based on ideas set by the law for itself, proving by this the law’s peculiar strength. The image of the law as a homogeneous and normatively closed medium, which the law suggests about itself (its existence, its self-identity, its boundaries, and its limits), has successfully subordinated philosophical reflection to the subject’s ideology. Therefore, the ontology of law has to be detached from the subject’s law and its ideologically formed self-image. An epistemological criticism of the law’s self-definition could prove its unverifiability at most. The genuine ontological question is neither its verifiability nor the disclosure of practical interests lurking behind the ideologies, but proving why the law’s ideology is an ontological component of the law’s construction and functioning, its *sine qua non*, serving as the specific deontology of the legal profession concerned.

Penetration of this question is mainly due to GEORGE LUKÁCS’ posthumous ontology of social being¹ and to some trends in deconstruction. Law is theoretically constructed, especially modern formal law, as the aggregate of teleological projections, linguistically formed. (Teleological projections

¹ Cf., by the author, ‘Towards the Ontological Foundation of Law (Some Theses on the Basis of Lukács’ Ontology)’ *Rivista Internazionale di Filosofia del Diritto* 15 (1983) 1, pp. 127–142 {reprint in his *Law and Philosophy* (Budapest: Eötvös Lóránd University Project on “Comparative Legal Cultures” 1994), pp. 375–390} & in *Filosofía del Derecho y Problemas de Filosofía Social X*, coord. José Luis Curiel B. (México: Universidad Nacional Autónoma de México 1984), pp. 203–216 [Instituto de Investigaciones Jurídicas, Serie G, Estudios doctrinales, 81] & <<http://www.bibliojuridica.org/libros/3/1051/20.pdf>>.

are reduced to the legal transformation of social relations, or to the reflection of transcendental principles or of material determinations as norms, or to psychological effects or individual reactions, or to the stand taken by the sovereign power.) It is a commonplace that what gets realised is always more or less, but something different, from what was originally intended in teleological projections; shifts in emphasis, even if unperceivable, can end in real changes of direction in the historical process.

Such changes occur necessarily in the law, since it has its own system of procedure (with its own *Erfüllungssystem* ['system of fulfilment'], according to LUKÁCS). Henceforth, discrepancies and incongruences may also occur. For, out of the heterogeneity of everyday practice, primary teleological projections must be accommodated by the law as its own secondary projections, transformed and made exclusive by its homogeneous medium.

Law is the medium of social mediation. It has no independent goal, but allows any goal to be attained through its procedures. As a mediatory complex, it helps keep change orderly. It selects its contacts with other complexes of the social totality. A threat of resorting to force has to stand behind it; nominally this is aimed at each and every addressee. However, it can actually be enforced only in exceptional cases. The law would certainly collapse if the need for implementing sanctions arose at a mass level. All in all, the law cannot serve as the exclusive carrier of social changes. By its symbolic re-assertion it can only assist the realisation of intentions in the course of their implementation. It can sanction casual deviancies, if these are isolated as the exceptions.

As social mediation, law works through the instrumentality of language, the other complex of mediation. Language can only be ambiguous and fuzzy—is completely inadequate for grasping individual phenomena—since it can resort to classifying generalisations at best. Logical subordination makes legal mediation no more than a phenomenal form. Legal professionals, through the machinery they operate, first turn actual social conflicts into conflicts within the law, then give them a formulation justifiable by logic, and strictly deducible from the positive law, and so transform them into sham conflicts.

The law must use internal technical concepts to preserve its homogeneity and to close its system normatively. It postulates its own construction by the notion of validity and its own operation by the notion of legality. These are the two pillars of its professional ideology, forming the so-called 'juristic world view', a kind of normativism; this frames the juristic activity within forms conventionalised within the law. It suggests the ideological presumption that expectations formed outside the law can only be satisfied by activities inside the law.

Thereby, the ontological concept of law has a wider range than positivism about rules. In addition to rules and the principles substantiating the rules' applicability, its concept includes thought patterns, conceptual distinctions, ideals, and sensibilities, as well as legal techniques and ways to proceed. Legal techniques are the kinds of representation and skill that define the genuine context of judicial reasoning in the given legal arrangement, the set of instruments which make it possible that a dynamic "law in action" will grow out of the static "law in books" in a way accepted in the legal community. Accordingly, both the legal technique and the thought-culture of the society must be recognised among the law's components.

In this way legal ontology comes close to what can be said about law by philosophy of praxis, cognitive sciences, and linguistic-philosophical analysis. Law is considered to be a historical continuum, gaplessly fed back by practice, and re-conventionalised through its everyday operation. It is an artificial human construct which cannot be interpreted without attending to the community environment (that is, LUDWIG WITTGENSTEIN's *Lebensform*) and interaction.

The law's concepts are fully technicised yet, in the juristic ideology, postulate a world as if they truly reflected the social environment in which the law is embedded. MARXISM and deconstructionism are quasi-epistemological criticisms of this reflection. They also criticise these technical concepts, as instruments of preservation which conceal the true nature of this world, falsify it, and so risk that ontological reconstruction will finally transform into an ideology.²

² Cf., among others, *Controverses autour de l'ontologie du droit* ed. Paul Amselek & Christophe Grzegorzczak (Paris: Presses Universitaires de France 1989) 228 pp. [Questions] (*Controverses about Law's Ontology* ed. Paul Amselek & Neil McCormick (Edinburgh: Edinburgh University Press 1991) xiii + 160 pp. [Edinburgh Law and Society Series]); Alexandre Kojève *Esquisse d'une phénoménologie du droit* Exposé provisoire (Paris: Gallimard 1981) 588 pp. [Bibliothèque des idées] (*Outline of a Phenomenology of Right* trans. Bryan Paul-Frost & Robert Howse (Lanham, Md.: Rowman & Littlefield 2000) xv + 492 pp.); Peter Goodrich *Reading the Law* A Critical Introduction to Legal Method and Technics (Oxford & New York: Basil Blackwell 1986) ix + 229 pp.; Georges Kalinowski 'La pluralité ontique en philosophie du droit: l'application de la théorie de l'analogie à l'ontologie juridique' *Revue philosophique de Louvain* 64 (1966), No. 25, pp. 263–280; Vladimir Kubeš *Ontologie des Rechts* (Berlin: Duncker & Humblot 1986) 470 pp. [Schriften zur Rechtslehre 118]; Wiesław Lang 'The Ontology of Law' in *Sprache, Performanz und Ontologie des Rechts* Festgabe für Kazimierz Opalek zum 75. Geburtstag, ed. Werner Krawietz & Jerzy Wróblewski (Berlin: Duncker & Humblot 1993), pp. 221 et seq.; Daniela Tiscornia 'A Methodology for the Representation of Legal Knowledge: Formal Ontology' *Sorites* (1995) in <http://www.sorites.org/Issue_02/item3.htm>; Michel Villey 'Essor et décadence du volontarisme juridique' in *Leçons de la philosophie du droit* (Paris: Dalloz 1962), pp. 271–283; Jerzy Wróblewski 'Ontology and Epistemology of Law' *Rivista Internazionale di Filosofia del Diritto* 50 (1973) 4, pp. 832–860.

LAW AND HISTORY*

On the Historical Approach to Law

History is one of the main poles of relationship to law. By historicity of law one means not only the purely internal and technical components of the law's individual instruments but also the embeddedness of legal phenomena in contexts of development; that is, the concrete *hic et nunc* of their explanation within the paradigm of challenge and response, as ARNOLD TOYNBEE termed it. On the other hand, historicity emphasises the factor of traditions in legal development. In the modern era three currents of legal thinking focused on such historical inquiries: the historical school of law [*historische Rechtsschule*] in Germany, historical jurisprudence in England, and MARXISM—which was born between the former two but developed in its full display in the recent past. All three currents were variations of the dominant evolutionism, bringing the idea of legal evolution into focus, according to PETER STEIN, an “assumption that changes in the law followed a predetermined sequence of stages parallel to stages of social evolution”.¹



The historical school of law was formed at the beginning of the 19th century in opposition to German efforts at reforming civil law through codification. It intended to prove that law was something other, and more, than the mere product of legislation and that its contents were not governed by the allegedly universal nature of man but rather by the particular character of the society to which it was applied. “Statutes are not the only

* A version of the entry ‘History (Historicity of Law)’ originally published in *The Philosophy of Law* An Encyclopedia, ed. Christopher Berry Gray (New York & London: Garland Publishing 1999), pp. 371–373 [Garland Reference Library of the Humanities 1743] & <<http://bokkrags.com/tandf/history-30-tf/>>, reprinted as ‘Law and History: On the Historical Approach to Law’ / ‘Jog és történelem: A jog historikus vizsgálatáról’ in *Historical Jurisprudence / Történeti jogtudomány* ed. József Szabadfalvi (Budapest: [Books in Print] 2000), pp. 281–285 [Philosophiae Iuris / Jogfilozófiák].

¹ Peter Stein ‘The Tasks of Historical Jurisprudence’ in *The Legal Mind* Essays for Tony Honoré, ed. Neil MacCormick & Peter Birks (Oxford: Oxford University Press 1986), pp. 293–305, quotation on p. 294.

sources of juristic truth”—announced GUSTAV HUGO’s program,² and FRIEDRICH CARL VON SAVIGNY—inspired by EDMUND BURKE’s conservatism and JOHANN GOTTFRIED HERDER’s concept of nation—described law as “the common conviction of the people, the kindred consciousness of an inward necessity, excluding all notion of an accidental and arbitrary origin”, which was developed “by internal silently operating powers, not by the arbitrary will of a lawgiver”.³ Startled by the romantic terminology of *Volksgeist*, the famous ‘popular spirit’, its critics declared SAVIGNY’s school to be non-philosophical,⁴ a- and anti-historical,⁵ having recourse to biologicistic mystification⁶ and actualising the past.⁷ Yet, in the light of today’s complex historico-sociological and anthropological reconstruction of the factors and processes of legal change, it can rather be interpreted as an early and sensible description.

Historical jurisprudence was born at Cambridge from Sir HENRY MAINE’s lecturing efforts at providing a proper legal theory for his students; this would meet the requirements of a positivistic scientific ideal but would overcome JEREMY BENTHAM’s and JOHN AUSTIN’s speculative and unjustifiable stance in which law was just the command of the sovereign. He found both example and analogy in Sir CHARLES LYELL’s *Principles of Geology* (1830), according to which changes in the earth’s surface were not caused by periodic and unpredictable, sudden catastrophes, but were rather the result of regular physical forces in constant but gradual, and almost imperceptible, change.⁸ Ironically enough, neither the evolutionary line he portrayed “From Status to Contract” nor “Fiction, Equity and Legislation” he had defined as the three successive instruments of legal change proved to be sustainable. The lasting effect of his classic *The Ancient*

² Gustav Hugo ‘Die Gesetze sind nicht die einzige Quelle juristischer Wahrheiten’ in *Civilistisches Magazin* IV (1812) 1, pp. 89–134.

³ F. C. von Savigny *On the Vocation of our Age for Legislation and Jurisprudence* [1814] trans. Abraham Hayward (London: Littlewood and Co. 1831) ix + 192 pp. on pp. 24 and 30.

⁴ „unphilosophische Schule” in Eduard Gans *System des römischen Civilrechts im Grundrisse* (Berlin: Dümmler 1827) iv + 238 pp. at p. 163.

⁵ „ungeschichtlich, geschichtswidrig” in Otto von Gierke *Die historische Rechtsschule und die Germanisten* Rede zur Gedächtnisfeier des Stifters der Berliner Universität König Friedrich Wilhelm III in der Aula derselben am 3. August 1903 (Berlin: Schade 1903) 61 pp.

⁶ W. Schield ‘Savigny und Hegel’ *Anales de la Catedra Francisco Suarez* (1978–1979), Nos. 18–19, pp. 271 et seq. at p. 295.

⁷ Hermann Klenner ‘Savigny und das historische Denken in der Rechtswissenschaft’ *Anales de la Catedra Francisco Suarez* (1978–1979), Nos. 18–19, pp. 133 et seq. at p. 141.

⁸ Cf. Peter Stein *Legal Evolution* The Story of an Idea (Cambridge, etc.: Cambridge University Press 1980) xi + 131 pp. [The R. M. Jones Lectures in the Development of Ideas], p. 88.

Law (1861)⁹ was that it provided an analytical framework to approaches that later became known as legal anthropology and legal sociology.

MARXISM forged a genuine principle from historicity by taking evolutionism seriously. “The anatomy of men holds a key to the anatomy of the ape”: MARX’s thesis from his *Grundrisse der Kritik der politischen Ökonomie* (1857)¹⁰ throws light upon his belief that the question on the nature of the open, latent potentialities inherent in the paths of development can only be answered retrospectively as assessed from the perfected state actually achieved. It is exclusively this perfected state that offers criteria for defining what the meaning of the perspectives on development has been.¹¹ Today’s theories are opposed to this. By respecting the principle of historicity, they do not construct any sequence of events as embodiments of the laws (or teleologies) of any philosophy of history.



According to FREDERIC WILLIAM MAITLAND, “[h]istory involves comparison”.¹² Comparative approaches showed that

(a) law lives its own life to a considerable extent, largely independent of its direct conditions, and that

(b) it develops mostly by following its own inertia through borrowing from alien patterns, as noted by ALAN WATSON.¹³

Today’s more differentiated knowledge about law¹⁴ suggests these claims:

⁹ Sir Henry Sumner Maine *Ancient Law Its Connection with the Early History of Society, and its Relation to Modern Ideas* (London: J. Murray 1861) vi + 415 pp.

¹⁰ *Grundrisse der Kritik der politischen Ökonomie*, p. 25 in *The Portable Karl Marx* ed. Eugene Kamenka (New York: The Viking Press 1983), p. 390.

¹¹ Cf. *Marxian Legal Theory* ed. Csaba Varga (Aldershot, Hong Kong, Singapore, Sydney: Dartmouth & New York: New York University Press 1993) xxvii + 530 pp. [The International Library of Essays in Law & Legal Theory: Schools 9].

¹² F. W. Maitland ‘Why the History of English Law is Not Written’ [1888] in his *Collected Papers* I, ed. H. A. L. Fisher (Cambridge: Cambridge University Press 1911), pp. 487–492 at p. 488 {& in <http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=871&chapter=70245&layout=html&Itemid=27>}.

¹³ Alan Watson ‘Comparative Law and Legal Change’ *Cambridge Law Journal* 37 (1978) 2, pp. 313–336.

¹⁴ E.g., by Csaba Varga, *The Place of Law in Lukács’ World Concept* (Budapest: Akadémiai Kiadó 1985; reprint 1998) 193 pp. and *Law and Philosophy Selected Papers in Legal Theory* (Budapest: ELTE Project on “Comparative Legal Cultures” 1994) xi + 530 pp. [Philosophiae Iuris]—especially ‘Law as History?’ [1986] in *ibidem.*, pp. 477–484—, as well as *Lectures on the Paradigms of Legal Thinking* (Budapest: Akadémiai Kiadó 1999) vii + 279 pp. [Philosophiae Iuris].

(1) Law is composed not only of rules, nor merely of rules and principles. In solving social conflicts, law, through an intermediating filter, is primarily a culture of mediation (in the philosophical sense of *Vermittlung*) with its own sensibility, conceptualisation, ways of channelling, and skills of handling. It provides a medium for having recourse to principles and rules in the resolution of conflicts, through which the principles and rules referred to in the procedure obtain their standardised (that is, interpretable and justifiable) significance and meaning in the given culture.

(2) This very culture is historical, as it is carried on by human praxis traditionalised from the past, reconventionalising conventions through their continuous re-actualisation.

(3) Therefore, neither immobility nor leaps in development can be characteristic of law. Furthermore, this is why neither following external patterns nor purely internal development can be characteristic, exclusively. Any of these extremes can at most only be dreamed about. What is actually achieved is necessarily the outcome of a compromise.

(4) This compromise is historical by definition. It is aimed at providing a pragmatic response, and it can only do this through relying on the memory of the past or the experience of others, as processed and filtered through its own medium (informed by its world-concept, ideologies, utopias,¹⁵ and so forth). It has to be used, not understood. Therefore, to talk about its *misunderstanding* could only prove the *misperception* of the basic setting. “Je prend mon bien où je trouve” [I take my value where I find it]—said MOLIÈRE’s character, since the only thing that matters is not What is it made from? but What is made from it?

(5) Throughout its life, the multifactorial character of law becomes one of the sources of this multifactoriality itself. Enacted rules (*l e g i s l a t i o n*), patterns enforced by authoritative decisions (*p r e c e d e n t*), and behaviours accepted as legal by the community (*c u s t o m*) compete with each other as practical components of law, in a constant

¹⁵ Cf., e.g., Csaba Varga ‘Utopias of Rationality in the Development of the Idea of Codification’ *Rivista Internazionale di Filosofia del Diritto* [Roma] LV (1978) 1, pp. 21–38 {& in *Law and the Future of Society* ed. F. C. Hutley, Eugene Kamenka & Alice Erh–Soon Tay (Wiesbaden: Franz Steiner Verlag 1979), pp. 27–41 [Archiv für Rechts- und Sozialphilosophie, Beiheft 11]}, as well as Clausdieter Schott ‘Einfachheit als Leitbild des Rechts und der Gesetzgebung’ *Zeitschrift für neuere Rechtsgeschichte* 5 (1983) 1, pp. 121–146 and Derek van der Merwe ‘Regulae iuris and the Axiomatisation of the law in the Sixteents and Early Seventeenth Centuries’ *Tydskrif vir die Suid-Afrikaansa Reg / Journal of South African Law* 3 (1987–1988), pp. 286–302.

maelstrom to determine what will prevail as the law in the given society. Overcoming others can only be temporary, and the struggle for domination will continue. Yet the law's actual composition can actually be reshaped from either side.

(6) Positive law is exposed to modification by alternative strategies: through formal (textual) amendments and/or by changing (re-conventionalising) its contextual (conventional) environment.

(7) In a historical perspective, all effects cumulate and finally will conclude with a change in law.

LAW AS HISTORY?^{*†}

1. Understandings of the Term 'Law' [36] 2. Law and History [38] 2.1.
Law as Instrument [38] 2.2. Law as Culture [42] 3. Law as History [43]

1. Understandings of the Term 'Law'

In every culture that is familiar with law, one meets with a certain duality in the conceptual understanding of law.

Regarding the outstanding role that law plays in solving social conflicts, settling basic human relations and, therefore, safeguarding the final integrity of society, every regime of law has a characteristic form of appearance, which facilitates its recognition and identification, and, thus, its use as a basis of reference to or justification for processes relying on the law. This appearance can take multifarious forms, but it is mostly connected with (1) certain peculiarities of the usual customary course of social practice, (2) certain peculiarities of the decisions made by authorities acting in the name of the law, and (3) a certain way and form

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[†] As to its methodological and conceptual background, in its first version the present essay had been inspired by George Lukács' posthumous *Towards the Ontology of Social Being*. For its jurisprudential interpretation, see, by the author, 'Towards a Sociological Concept of Law: An Analysis of Lukács' Ontology' *International Journal of the Sociology of Law* 9 (1981) 2, pp. 157–176; 'Is Law a System of Enactments?' in *Theory of Legal Science* ed. Aleksander Peczenik, Lars Lindahl & Bert van Roermund (Dordrecht, Boston & Lancaster: Reidel 1984), pp. 175–182 [Synthese Library 176]; *The Place of Law in Lukács' World Concept* (Budapest: Akadé-

of enactment by the bodies competent to pass laws. In contemporary Western culture, taking the ideal of modern formal law as a basis, the law is generally regarded as an enacted normative text, an institutional system formally defined in such texts, in other words, as a merely formal standard taken as an instrument.

At the same time, it is beyond any doubt that this concept of law is not intended either to limit the diversity of legal phenomena or to replace their description. It is merely used—through specific formal indications and consciously undertaken simplifications—to make it easier and safer to find the path leading to the identification of the legal phenomenon. Therefore, it does not limit the validity of the truth that both this legal phenomenon and its instrumental nature only become visible through their influence exerted on society. The conceptual understanding of law as a functioning whole also involves traditions relating to the practice and training of the legal profession, the patterns of both professional and public attitudes about the law, the established methods of administering justice by applying the law and—last but not least—the actual significance and role the legal complex has in the life of society, as components of the concept ‘law’. Viewed in this way, law is also an integral and, in extreme cases, dominant factor of the culture of society. What is more, it also conveys culture, because it is, as a legal culture, basically a derivative of the general behavioural, communication-based and, in the first place, political culture of society; at the same time, as a relatively autonomous component of social culture, it shapes the culture of society as a whole.

miai Kiadó 1985 [reprint 1998]) 193 pp.; ‘Law as a Social Issue’ in *Szkice z teorii prawa i szczegółowych nauk prawnych* Professorowi Zygmuntowi Ziembinskiemu, ed. Sławomira Wronkowska & Maciej Zieliński (Poznań: Wydawnictwo Naukowe Uniwersytetu im. Adama Mickiewicza w Poznaniu 1990), pp. 239–255 [Uniwersytet im. Adama Mickiewicza w Poznaniu: Seria Prawo nr 129]. As to the historical examples, they have mainly been taken from Alan Watson *Legal Transplants An Approach to Comparative Law* (Edinburgh: Scottish Academic Press & Charlottesville: University Press of Virginia 1974) xiv + 106 pp. [Virginia Legal Studies]; Csaba Varga *Codification as a Socio-historical Phenomenon* (Budapest: Akadémiai Kiadó 1991) viii + 391 pp., as well as Kálmán Kulcsár ‘Politics and Law-Making in Central-East-Europe’ in *Legal Theory and Comparative Law Studies in Honour of Professor Imre Szabó*, ed. Zoltán Péteri (Budapest: Akadémiai Kiadó 1984), pp. 179–209. And finally, as to the quotation in German by Karl Marx & Friedrich Engels from their early *The German Ideology* [1844] [cf. also <<http://www.marxists.org/archive/marx/works/1845/german-ideology/index.htm>>], it has actually been intended to serve also as a declaration of breach with the juristic philosophies of history by GEORG FRIEDRICH PUCHTA and FRIEDRICH CARL VON SAVIGNY, prevailing in Germany at the time.

The complexity of law is defined by its nature. In social existence as a complex of complexes (*Komplex aus Komplexen* in GEORGE LUKÁCS' term), law plays a mediating role. It is differentiated from other mediating complexes in that it filters all social goals and movements through its own system of requirements by transforming them into specifically legal objectives and motions. This way, its own system of fulfilment (*Erfüllungssystem* in the same terminology) makes it independent and distinct from anything that is merely social, i.e., anything differentiated as not pertaining strictly to law. It expresses its growing autonomy in explicit forms through entrenching it via an increasing number of formal symbols. At the same time, its independence in the social total complex (i.e., its specific heterogeneity within the overall social homogeneity) is only relative and illusory in the final analysis, because, in its entirety, the social process itself is nothing more than the aggregate of interactions given at any one time. In other words, every component in the social totality can only be as significant as the actual role it played. Thus, only its concrete functioning shows what and to what extent is real in the claim of law to autonomy. To summarise: law is being shaped in interaction with the social totality. This enables its autonomy to develop at all but, at the same time, this makes its interaction relative and, in extreme cases, illusory as well.

2. Law and History

Differentiation between these two understandings of law assumes a decisive importance when we examine the relationship between law and social change, or law and history. The law, interpreted merely as a formal instrument and in its form as an instrument, creates completely different relationships than the law, interpreted as a regime of orderly interactions in its practical functioning and social effect, which is regarded as an integral component of the life and culture of society.

2.1. Law as Instrument

In the development of the law as a mere instrument, the formally defined specificity of the legal sphere plays a near dominant role. Socio-historical factors have little if any direct influence on the shaping of this mere instrument. In other words, even motives that are purely incidental from the point of view of the historical process and concrete social challenge may have a decisive influence on how and through exactly what the

instrument of the law will react, that is, what will be transformed into what, and into what it will develop when it responds. In philosophical terms, the growing tendency of socialisation (*Sozialisierung* in LUKÁCS' terminology) in social development explains this illusory autonomy. Socialisation means mediatedness gaining ground in social relations, and indirectness, increasingly characterising interactions. It also means that directness and uni-directionality wane and gradually disappear even from apparently simple teleological processes. There remains nothing but interim mediations. Moreover, the process itself becomes increasingly multi-directional with several opportunities to develop toward various end points and, at the same time, it becomes socially conditioned, distilled to an increasing extent. That is, the other social complexes participating in this composite movement also display their relative autonomy and specificity in an increasingly pure and definite manner. Accepting this involves nothing but sober realism, as against the inspiring belief in universal evolution: instrumental continuity is recognised thereby as the main component in the development of law as an instrument. It means that new answers to increasingly new challenges are usually not generated through the development of new instruments but rather—for purposes of intellectual economy, and also due to the forces of habit, inertia and imitation—through re-interpretation, re-combination or transplantation of the already available ones. All this naturally involves a host of sources of errors, as well as the possibility that conditions completely alien to the nature of the issue will gain a decisive influence. In this way, for example, the question of what old or foreign legal solutions were available or known in the given place and at the given time may assume a decisive importance.

To give an example: let us consider how the regulation of responsibility for an ox goring a man to death was transmitted in the cultures of Mesopotamia for centuries—from the Laws of ESHNUNNA through the Code of HAMMURABI to the book of *Exodus* in the Old Testament. Not only the identical substantive and procedural solutions characteristic of the region were inherited, but also the historically incidental extra regulation linking responsibility to one precondition, namely, that the owner had to be notified of the ox's inclination to gore, officially and in advance. Or, let us consider how the Scots law, having developed in the shadow of English law, took the decisive steps on the road to modernity in just a few decades towards the middle of the 17th century, while its conceptual system covering the fields of private law began to depart from the contemporary English tradition in order to achieve a final organisation according to the

classical model inherited from JUSTINIAN. The explanation for the rapid change lies in the availability of certain treatises of law, which in the late 16th to mid-17th centuries relied on English sources and traditions in their practical material but turned for assistance in their exposition and systematisation to concepts and conceptual distinctions known from the Code of JUSTINIAN.

Therefore, our conclusion can only be that law taken as a mere instrument has a relatively free scope of movement in history. Our starting point here can only be that there is *no equivalence between means and ends*. Different means can serve the same social end with equal or, at least, similar efficiency, depending on the established traditions, habits and stimulations. At the same time, the instruments at the law's disposal constitute only one component—flexibly defining the general framework for action—of the influence exerted. This is so because, by itself as a norm-text, the law is merely an abstract entity, which can only be actualised through the concrete practices of interpretation and social or juridical application. Consequently, it is futile to attempt to reconstruct human history by starting out from the law as a closed set of formalised texts, or to draw clear-cut conclusions regarding the law from the development of history. Naturally, parallelism undoubtedly exists. For example, “legal archaeology” is just as (though, in contrast to certain excessive opinions, I believe, not more) relevant regarding the exploration of the whys and the wherefores of the historical processes of the past as the archaeology of working tools, practices of settlement or ritual habits and beliefs.

To use concrete examples: It can hardly be ascertained on the basis of economic or political conditions alone what was the determining factor in Western legal development that caused its splitting into patterns that diverged later on as the Civil Law and Common Law—despite the common Roman traditions. Equally, it is impossible to deduce from social development and its challenges alone why and how free contractual forms became institutionalised in one system, whereas in another system the legal construction of the trust—still unrivalled in its extreme malleability—became established. On the other hand, however, if legal regulation is taken as a starting point, a researcher influenced by our present culture may, sometime in the distant future, hardly be able to gather the harsh reality of history through reviewing, for instance, the Soviet Constitution adopted in 1936. This is so because it served as the normative basic charter for building Soviet society from the STALINist period, through the post-STALINist transitional years and the attempts at renewal by the 20th and 22nd

Congresses of the Soviet Communist Party under KHRUSHCHEV, up to the new Constitution adopted in 1977 in the BREZHNEV era. Or, how could any future researcher imagine the hardships of Hungarian history under the Soviet occupation, based on the early open and definite constitutional declaration of the right of public assembly? After all, the Soviet-patterned Constitution of the year 1949 (and especially at present) seems to be severed through circumstantial regulation although we alone, the witnesses of this history in the late 1980s, can know that all this simply reflects the replacement of mere verbalism with detailed regulation in the interests of living practice.

The dilemma remains basically the same if the law as an instrument is not interpreted as a concrete solution, but as a form of normative definition of such a solution in a norm-text. Well, whether it be customary law, judicial law-making, legislation (codification) or the forms of arrangement of legislation (revision and consolidation), in most cases, it is possible to pinpoint a clearly definable series of historical events that give the procedure or form concerned its typical characteristics, thereby also providing its ideal type. In this way, at the first approach European customary law can be correlated with the Middle Ages, precedent-law with the English legal development, the 'code' with the work of JUSTINIAN and codification with the civil law issue of the French Revolution. However, taking a closer look at these, it is immediately obvious that this is but the absolutising projection of certain achievements of European civilisation as universal. This is inadmissible, because it would mean the reduction of individual products of cultural development to their local conceptualisations in the form of so-called "folk-concepts", characteristic of typified carriers of culture—in other words, extending what is historically particular to being universal. In any event, whichever variation of a procedure or form in law manifested in the history of the development of civilisation is explored, it immediately becomes clear that, under differing conditions, any of them could successfully fulfil any social function that the law has ever been able to serve.

Therefore, the functional typology of codification is identical with the typology of the law itself. Equally, it can be said that precedent-law, as it appears in the British, American, South African, Israeli or so-called mixed legal systems, could successfully serve both socio-legal preservation and change everywhere. In a similar way, customary law, which developed in Europe during the Middle Ages, had a different role in Hungary during the 16th and 17th centuries, divided into several parts by Turkish and Austrian

conquerors, where its non-official consolidation by WERBÖCZY's *Tripartitum* served as an effective means of preserving national, and within that, legal unity. And obviously, even farther away is the role that so-called primitive customary law could play in its own apparently formless regimes.

2.2. *Law as Culture*

However, the moment that the law is viewed in its social reality, i.e., in action and together with the preconditions and effects of its functioning, we come to a different conclusion. In this case, law is regarded as a part of general social culture, as something embedded in this (historically determined and, at the same time, history-shaping) culture. It is exactly due to these cultural roots and the corresponding attitudes and mentality that it can sometimes display surprisingly strong continuity, and even at times resistance, in the face of the storms of history, which may compel the most drastic changes. Therefore, while the fate of the law as a mere instrument is the direct issue of actual might, it can turn into a powerfully autonomous and self-asserting entity as a component of history if it grows into a tradition. For the law, conceived of as a part of general culture, is a complex phenomenon which shapes history from the outset. Naturally, it is clear from the point of view of any historical or socio-ontological reconstruction that this does not involve a uni-factorial definition but, in the first place, a filtering role that gives a form, and through this filter, also selects, shapes and turns it into specificity. It means that the legal complex (in a way similar to any social complex that has developed its relative autonomy and peculiarity) reacts to the challenges of its environment in its own way. It reacts to the most heterogeneous inputs with its homogenising outputs, which themselves are quite external and alien to the inputs arriving from the environment. In this way, it will eventually shape the practical realisation and effect of the outside changes, as its relative autonomy and developed specificity enable it to integrate these changes into its own system, by adjusting them to its own structure and structured reaction. And such a well-developed (though relative) independence of action and reaction can, in extreme cases, determine the nature and even the outcome of the events.

Let us consider how the CONFUCIAN tradition—invariably, but with extreme adaptability—has for thousands of years shaped the concept and the entire fate of the legal phenomenon in China and Japan. This is so because the Western pattern of social regulation, embodied in the guarantee of individual rights and codified in all its details in advance, ready-

made for application, often continues to fight for its recognition only from the periphery of judicial practice, although the modernisation programmes of socio-economic transformation aimed at promoting the Western pattern and mentality have for almost a century set as their objective the replacement of this traditional legal ideal. Or, let us consider the lasting effect of the mixing of the Byzantine and Mongolian heritages on the development of the genuinely Eastern (orthodox) region of Europe (from Russia and Bulgaria to Romania and Serbia) primarily with respect to the exclusivity, unity and charismatically rooted legitimacy of power, the identification of a variety of state activity with law and the lack of legal constructs (like the hypostatisation of a ‘social contract’) designed to differentiate between society and the state—at least ideologically. Or, let us consider how the ancient fundamental freedoms—one after the other subdued and made dependent on royal might and grant by the European absolutisms—remained intact in the British legal development, and became the basis of the legal culture firmly fenced round with legal guarantees that is a striking characteristic of the Anglo-American legal mentality. This legal culture is one that has so far successfully avoided the threatening perspective of having its values degraded into mere instrumentality and being forced to experience the self-destructive defencelessness of legal positivism in the face of power, and the destruction caused by legal machinery directly controllable through political impulse.

3. Law as History

All this leads to a double conclusion: if the law is viewed in its entirety, and not as stripped to a mere instrumentality, it turns out to have its own history as well, and through this, it also acts as a factor shaping the history of mankind.

It is remarkable that the programme of *historicity* was formulated in contrast to the emptiness and lack of productivity of scientific positivism in the middle of the 19th century: “We know only a single science, the science of history.”¹ However, it would be incorrect to arrive from this

¹ „Wir kennen nur eine einzige Wissenschaft, die Wissenschaft der Geschichte.” Karl Marx *Der historische Materialismus* Die Frühschriften, hrsg. Sigfried Landshut & J. P. Mayer, II (Leipzig: A. Kröner 1932), p. 10 [Kröner Taschenausgabe 92].

at some sort of a mystical history—one that is complete in itself, in which every achievement and stage of development is nothing but a simple derivative. This doctrine establishes the priority of the logic of history, embodied in evolvment and formation, over any immanent logic; at the same time and in contrast to any unidirectional causal determinism, it also carries the presentiment of the complexity of historical self-determination. By now, we are already aware that, ontologically speaking, existence consists of interactions actually taking place. The total motion emerging from these at any given time will determine, among other things, which side proves to be the stronger in a given interrelationship, to be “over-riding” or “over-weighty” as the “predominant moment” (according to the terms of LUKÁCS); in other words, which one will, in the final analysis, define the direction and outcome of the motion resulting from the interaction. In addition, we also know that, due to the progress of socialisation (which increases the number of complexes participating in the overall social movement and the evolvment of their specific independent ways of reaction), it is hardly feasible to envisage or programme with certainty what will exercise the final influence on the given process and how it will do so. And this necessarily leads to the conclusion that the totality approach provides the only theoretical framework for the successful reconstruction of what is actually taking place in social processes. This approach starts out from the emerging whole to establish which factors have successfully participated in the process leading to this whole, given at any time. It also starts out from there when it tries to assess *a posteriori*, where and in which direction the overriding factors exerted an influence, as well as how and to what extent they were shifted in the above mentioned process of mutual definitions.

For example, it would be worth analysing how the overriding role, usually attributed to the economic sphere in MARXism, is differentiated and how it actually disappears in the case of the countries divided after the Second World War (for instance, Germany and Korea). For the economy, as a partial element of the social set-up, is conditioned on politics, whereas politics is directly conditioned on external power relations. Therefore, it is politics that performs the basic switching (determining the direction) at the first partings and plays a role in all successive shiftings of points as well. And what all this involves is not the replacement of a uni-factorial determination of the given kind by one of another kind, but a complex process of determination, including a set of partial self-determinations, in which even the overriding factors at the most may have a role under certain cir-

cumstances, whereas in other circumstances they give way to a movement possibly in an opposite direction, contradictory to the former. (This example is all the more valid, because this co-ordinating role of policies and human intervention can be observed not only in the case of those divided societies but also in the general progress of all societies, as well as how they drift into conflict, handle their internal crises and shape their manner of reaction and ability of adaptation.)

The second conclusion follows from what has been said above about the law as a component of culture. At the same time, it is also directly connected with the relativity of the law's autonomy in society. How do I understand this? As is well known, when considering the progress of socialisation we have to take into account increasingly complex processes of determination in which the place of law is increasingly less defined through conscious planning, while other factors come easily and (at least, measured on a human scale) enduringly to the forefront to assume an overriding role, downgrading law to an ancillary position. In such a case, we can fight for the protection and further development of the values of civilisation, embodied by the law, only through deepening the roots of the law, taken as a component of culture. This means that fighting for law and order is not only a merely instrumental task to be considered within the context of social challenge and legal response. For the fight for law and order presupposes a striving to establish tradition and found culture. This explains why a peremptory decision is not enough to establish and solidify law and order. It can only be the issue of the consistent work of generations to make political and legal culture into an everyday practice, imbued and also identified with the basic cultural values of society. Therefore, any struggle for law and order is at the same time a struggle to establish well-rooted legal traditions, which prepare for the future by the evolvment of their specific values, and, thereby, contribute to ensuring an optimum defence against the possible storms of any future.

In our age, several nations struggle with the lack of adequate, socially and politically desirable traditions. The survival of old—and now sometimes dysfunctional—mentalities and ways of behaviour is most often explained by the lack of traditions. However, as soon as there is a chance for development and to draw upon the national past, it emerges that the actual problem is by no means seated exclusively in the lack of antecedents or the need to start from the level of a *tabula rasa*. The underlying difficulty is that the tradition concerned did not prove to be strong enough to be properly integrated into the general social culture, to be able to sustain, rege-

nerate and renew itself, and withstand, in unfavourable times, being carried away by currents of a different direction, and eventually reduced to a small fragment retained in past memory.

In the Central European region, for instance, there is much talk about the lack of democratic traditions. What reflects the existence of this lacking is, paradoxically, nothing but speaking about the lacking at all, that is, admitting a discontinuity, which in itself is an attempt to cut off the threads, although perhaps invisible yet in effect, leading from the past to the present, and to sweep the still existing traditions from memory—this way further encouraging the reduction of their already meagre resources. Even if, for example, in the Hungary of the socialist era it was not to become the usual practice to subject laws to the control of constitutional review, and administrative decisions to the control of administrative courts, and thereby make the rules of the state-and-society-game a public affair, while, at the same time, and in an indirect way, re-legitimising them—well, all this cannot obliterate the fact that, before the Communist take-over in 1948, marking a caesura in the survival of traditions, there existed a considerable rural self-government, a multi-party system, a tolerance that also applied to the political opposition (only provided that they too observed those rules of the game), a flourishing life of associations and societies and, what is more, in addition to the judicial control of election, a kind of administrative jurisdiction; and, in the final account, all this does embody, alongside the numerous ideas and achievements of the national independence struggles and the lessons of parliamentary battles during several remarkable decades of legislation, a democratic tradition and stimulation that is not at all negligible. However, the mosaic-like character of those Central European traditions speaks of one certain condition more eloquently than anything else. Notably, in their totality, they were still fragmented, stunted and inadequately integrated into community practice and values. Therefore, as traditions, they failed to have roots deep enough to withstand the winds blowing in the opposite direction, and to filter at least some of their direct effects through their own medium. Or, their extinguishment is simply proof that they did not have enough strength to survive, in other words, to exercise an effective influence against the actually overriding factors.

Repeating the basic question: law as history? The message conveyed by an unbiased examination of the issue is that the ethos of theoretical and practical work on the law can only be born when the jurist realises both the significance of the given power to shape society, and the maxim according

to which the jurist, as an engineer of the formal mechanism of influencing and mediating within society, by working in the present, labours for the future. As a specialist of law taken as a culture, it is then possible to sense indeed that the object and also the issue of his or her work is history.

VALIDITY*

1. Notions of Validity [48] 2. Understandings of Validity [49] 3. Statism and Dynamism of Law [54] 4. Validity and the Realm outside the Law [55] 5. Dissolution of the Notion of Validity? [58]

1. Notions of Validity

Validity is the qualifying label for the norms in law and the acts executed in the name of the law, according to and by the force of which the norms and acts in question are recognised as the norms and the acts, respectively, of the existing legal system. This concept of validity, defining membership within the system,¹ is simultaneously completed by a concept of validity that selects and identifies the system itself. Accordingly, validity is also the qualifying label of the system itself, according to and by the force of which the system in question is recognised by the law and order of the international community as one of the national legal systems.

The concept of validity is only postulated analytically for the sake and within the frame of examination, but this does not have any reference in the outside world. In this sense, one can state that validity is an *a priori* idea not reducible to empirical terms determined by observable facts.² The very fact that talking about ‘invalid law’ would actually involve a *contradictio in adjectu* (or *oxymoron*) clearly shows this point.³ Accordingly, validity ascribes legal quality to a given norm from the outset; and its defectiveness

* In its first version, ‘Validity’ in *The Philosophy of Law* An Encyclopedia, ed. Christopher Berry Gray (New York & London: Garland 1999), pp. 883–885 [Garland Reference Library of the Humanities 1743] and, as enlarged, in *Acta Juridica Hungarica* 41 (2000) 3–4, pp. 1–12 & <<http://www.ingentaconnect.com/content/klu/ajuh/2000/00000041/F0020003/00383612>> <<http://springer.om.hu/content/mk0r8mu315574066/fulltext.pdf>>.

1 For Rainer Lippold ‘Geltung, Wirksamkeit und Verbindlichkeit von Rechtsnormen’ *Rechtstheorie* 19 (1988) 4, pp. 463–489 at p. 465, for instance, the meaning of *Geltung* is simply ‘Zugehörigkeit einer bestimmten Norm zu einer bestimmten Normenordnung.’

² Frede Castberg *Problems of Legal Philosophy* 2nd ed. (Oslo: Oslo University Press & London: George Allen & Unwin 1957) 120 pp.

³ Albert Fuchs *Die Rechtsgeltung* (Leipzig & Wien: Deuticke 1933) 88 pp. [Wiener staats- und rechtswissenschaftliche Studien XXII], p. 10 and Alexander Peczenik ‘The Concept ‘Valid Law’ *Scandinavian Studies in Law* 18 (1972), pp. 213–251 at p. 214.

or eventual withdrawal will negate that.⁴ The neo-KANTian methodology, however, which conceives reality in terms of a rigid duality between the domains of “is” and “ought”, treated validity as the property of ought projections. Therefore, it dedicated particular theories to it which should only be devoted to genuine problems of legal philosophy.

2. Understandings of Validity

Validity can be both substantive and formal. Substantive validity is an early form of the concept of validity. When law was not yet formalised, not yet embodied in forms, anything that manifested itself as part of the enforced order could become valid. For instance, in arrangements based on open reasoning, and not yet using the selective criterion of formal relevance—like the *dikaion* [justness] type of Graeco–Roman jurisprudence, *cadi* (Umayyad courts) jurisdiction in Islamic law, the rabbinic justice in Jewish law, the domain of the *li* [propriety] forming the main layer of CONFUCIAN law in China (as opposed to the *fa*), or the *giri* [rites] in Japan—, any consideration, argument, or reference could gain substantive validity, and could thereby become a component of law, inasmuch as it proved useful as a reference in the process of searching for the just solution. In the Middle Ages it was accepted that only the “good, old” law could get the legitimising stamp of validity. Consequently, legal actors tried to measure against customs the dispositions of newly enthroned monarchs, and even the statutory products of reforming legislation, so that correspondence might be established between them.⁵ Thus, the time-honoured practice proves its validity by itself; and, *vice versa*, ignoring the acceptance of a custom or breaking the application of it can grow into a force depriving it of validity (and this is called *desuetude*).

⁴ According to FUCHS, the proposition of „Dieser Rechtssatz gilt nicht mehr” is self-contradictory (or at least redundant) as the act of enacting involves already the positing of validity. In consequence, the criticism by Per Olof Ekelöf ‘The Expression »Valid Rule«: A Study in Legal Terminology’ *Scandinavian Studies in Law* 15 (1971), pp. 57–74 on p. 61, namely that the validity of a legal rule is always limited in time, has no relevance here, as the proposition of „Dieser Rechtssatz gilt nicht mehr” is just on the transmutation of both validity and—with it—the quality “legal”.

⁵ Fritz Kern ‘Law’ in his *Kingship and Law in the Middle Ages* [1919] trans. S. B. Chrimes [1939] (Oxford: Blackwell 1968) xxi + 214 pp. [Studies in Mediaeval History 4], pp. 149 et seq.

The formal concept of validity is the product of the *ius* [right] reduced to the *lex* [statute]. Its development can be traced down from the Roman imperial era to the institutionalisation of the modern formal law. Modern law provides that, independent of substantive criteria, any enactment can gain legal validity if issued (promulgated) by a certain authority through a certain procedure in a certain form; the enactment keeps its validity until the competent authority puts an end to it either expressly (for instance, through the repealing act of derogation) or implicitly (for instance, by counter-regulation) through a formal procedure.⁶ Accordingly and in the final analysis, validity is the stamp on criteria satisfied as to gain membership in the law, which may be achieved through appropriate enactment.⁷ Theoretical reconstruction names this as validity *transfer* and validity *derivation* within the system; it is ideal-typical, but is the

⁶ “According to the concept of systemic validity a rule *R* is valid in legal system *LS* if the following conditions are fulfilled: (a) *R* is enacted according to the rules valid in *LS* and thus has come into force; or (b) *R* is an acknowledged consequence of the rules valid in *LS*; (c) *R* has not been formally repealed (»derogated«); (d) *R* is not inconsistent with the rules valid in *LS*; (e) if *R* is inconsistent with any rule valid in *LS* then (ea) *R* is not treated as invalid according to the rules about conflict between legal rules or (eb) *R* is interpreted in such a way as to eliminate the inconsistency in question.” Jerzy Wróblewski ‘Validity of Law and Decision of Validity’ in his *The Judicial Application of Law* [Sądowe stosowanie prawa] ed. Zenon Bankowski (Dordrecht, Boston & London: Kluwer 1992), pp. 75–86 [Law and Philosophy Library 15] on p. 77.

⁷ This may be phrased as “nothing but a reference to the regularity of the way of producing the norm” [„exclusivement une référence à la régularité du mode de production de la norme”] — J.-F. Perrin *Pour une théorie de la connaissance juridique* (Paris & Genève: Droz 1979) 177 pp. [Travaux de droit, d’économie, de sociologie et de sciences politiques 117], pp. 95 et seq.—, meaning that “the norm in question complies with the norms providing for the membership of norms in the given system” [„cette norme satisfait aux normes qui régissent l’appartenance des normes au système”]—Uberto Scarpelli *Qu’est-ce que le positivisme juridique?* [Cos’è il positivismo giuridico (Milano: Comunità 1965)] trans. Colette Clavreul (Paris: Librairie Générale de Droit et de Jurisprudence & Bruxelles: Bruylant 1996) xii + 107 pp. [La pensée juridique] at p. 39—, as “it has been duly promulgated”—E. García Máynez ‘The Philosophical-juridical Problem of Validity of Law’ in *Latin-American Legal Philosophy* (Cambridge: Harvard University Press 1948), pp. 495 et seq. [The 20th Century Legal Philosophy Series III]—, that is, “it has been issued by a competent organ in accordance with the appropriate procedure”—Ernesto Garzón Valdés ‘Algunos modelos de validez normativa’ *Revista Latinoamericana de Filosofía* III (Mars 1977) 1, pp. 41–68 {shortened as ‘Two Models of Legal Validity: Hans Kelsen and Francisco Suárez’ in *Normativity and Norms* Critical Perspectives on Kelsenian Themes, ed. Stanley L. Paulson & Bonnie Litschewski Paulson (Oxford: Clarendon Press 1998), pp. 263–271 on p. 265}].

only one acceptable in any normative justification or reference.⁸ In the continental law of Europe, HANS Kelsen's vision, described in his so-called *t h e o r y o f g r a d a t i o n*, derives the origin of the legal order from the so-called basic norm, and this legal order has a hierarchical and pyramidal construction through its consistent derivation.⁹ In Anglo-American law, H. L. A. HART distinguishes between *p r i m a r y* and *s e c o n d a r y* rules, the former providing the genuine regulation, and the latter making and amending the former, that is, disposing of the conditions of its validity-granting and validity-ending.¹⁰

Leaving behind the substantive understanding of validity in the modern age, its formal new concept introduces a criterion of validity easy to prove even amidst circumstances of bureaucratic mass application, without any further recourse to the jurisprudence based on generations' experience of "good, old" custom, which is, in any case, hard to ascertain in judicial practice. Due to the fact that (1) any product issued by the competent agent (2) through the appropriate procedure—the fulfilment of which is (for the ease of practical identification) usually (3) manifested by its textual promulgation in the Official Gazette—will be accepted as the valid part of the law independently of any (further) substantive consideration, *p r o c e s s - r e l a t e d c r i t e r i a* will in the final analysis appear as *f o r m a l* ones.¹¹ Well, HART is unambiguous about the issue what Kelsen's *t h e o r y o f g r a d a t i o n* is ambivalent about, namely whether the final criteria of formal validity are purely (and doubly) formal in the sense that a formal (i.e., proce-

⁸ Even if it is endlessly open in theory. This is why Oliver Black—'Legal Validity and the Infinite Regress' *Law and Philosophy* 15 (1996) 4, pp. 339–368—closes it in principle at least by stating (on p. 339) that "(i) There are valid norms. (ii) A norm is valid only if justified by a valid norm. (iii) Justification, on the class of norms, has an irreflexive proper ancestral. (iv) There is no infinite sequence of valid norms each of which is justified by its successor."

⁹ Hans Kelsen *Reine Rechtslehre* Einleitung in die rechtswissenschaftliche Problematik (Wien: Deuticke 1934) xiv + 236 pp. at ch. V.

¹⁰ "While primary rules are concerned with actions that individuals must or must not do, the secondary rules are all concerned with the primary rules themselves. Secondary rules [...] specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined." H. L. A. Hart *The Concept of Law* (Oxford: Clarendon Press 1961) x + 263 pp. [Clarendon Law Series], p. 92.

¹¹ In the same way as—once the *lex* has replaced the *ius*—justice in law will also be reduced to the notion of "justice of the law", that is, to what can be procedurally achieved through considerations based upon the available norms in law. Cf., by the author, *Lectures on the Paradigms of Legal Thinking* (Budapest: Akadémiai Kiadó 1999) vii + 279 pp. [Philosophiae Iuris].

dural) aspect is defined in them formally, or they are (simply) formal in the sense that a substantive aspect (i.e., derivability) is defined in them formally. For the question of whether or not an individual norm is “issued in accordance with [the constitution]”¹² can equally be interpreted in the sense of formal proceduralism (identified by agents and processes) and of substantive derivability (identified by contents of superior norms or, at least, by exclusion of the logical exclusion of derivability). The latter interpretation is shared explicitly by scholars who propose to add “conclusion” and “freedom from contradictions” as complementary criteria to validity.¹³

In some Germanic cultures, ambivalence is also expressed by the duplication of meaning of the word ‘validity’, moreover, by the analytical distinction drawn within the range of a single concept [*Geltung*] while forming corresponding adjectives. For

“[t]he words ‘valid’ and ‘validity’, when applied to a norm, sometimes refer to the *existence*, as such, of the norm and sometimes to the *legality* of the act as a result of which this norm came to be.”¹⁴

¹² Hans Kelsen *Introduction to the Problems of Legal Theory* trans. Bonnie Litschewski-Paulson & Stanley L. Paulson (Oxford: Clarendon Press 1992) xlii + 171 pp. on p. 62, or, „verfassungsmäßig zustandegekommene Normen” in his original *Reine Rechtslehre* [note 9], § 30 (d).

¹³ Providing that validity can indeed be derived in this way, what is lost on the swings would be made up on the roundabouts, for we shall necessarily arrive at a paradox, self-contradicting within, and thereby also destroy the entire Kelsenian construction. For this would negate the basic message of Kelsen’s claim that there is no quality in law except if posited by an act valid in the law. Accordingly, validity as a normative precondition of the legal quality of regulatory and declaratory acts could equally be posited by any act without such a precondition, too. Or, this is to say that we could exclusively step from one zero point, only to arrive at another zero point, when deriving legal quality.

On the other hand, considering that Kelsen’s understanding of validity is the “existence” and not a “property” of law and of its individual norms, then, as contrasted to the understanding of truth in epistemology, this “existence” of the norm cannot also be its substance or aspect simultaneously. Consequently Kelsen does not generate ambivalence but rather this is our interpretation at most. Wróblewski’s definition [note 6] both reproduces and misunderstands this ambivalence when he catalogues logical consequences in the extension of positive law [paras (b), (d), and (e)]. Garzón Valdés ‘Algunos modelos...’ [note 7], for instance, contradicts this position. For him (pp. 261–265), “Kelsen’s basic postulates: (1) The validity of a norm cannot be inferred from, or based on, facts. (2) The validity of a norm is its specific form of existence. (3) When a norm is valid (that is, exists), it ought to be obeyed; and if it is disobeyed, the competent organs ought to impose a sanction. (4) A norm is valid if it has been issued by a competent organ in accordance with the appropriate procedure.”

¹⁴ Georg Henrik von Wright *Norm and Action A Logical Inquiry* (London: Routledge and Kegan Paul & New York: Humanities 1963) xviii + 214 pp. [International Library of Philosophy and Scientific Method].

In the notional construction of the German ‘*gültig*’, the Swedish ‘*giltig*’ and the Danish ‘*gyldig*’, on the one hand, and ‘*geltend*’, as well as ‘*gällende*’ and ‘*gældende*’, on the other,¹⁵ both ambivalence and analytical distinction are expressed by differentiating what is valid itself from what can at most gain validity as an act performed.

What this concept suggests is a state of quiescence with immobility, orderliness, reliability, and foreseeability: objectivity independent of any subject, that is, something pre-established and pre-settled as given in things themselves from the beginning, something internal that may at most be revealed to the analyst observing from outside. What, then, is validity after all, and what can its apparent similarity to truth suggest? “Although legal norms cannot be said to be true or false, statements that a particular norm is valid can be either true or false.”¹⁶ Well, such a recognition can indeed substantiate similarity in conception and methodology;¹⁷ however, it makes it clear that truth and validity are different categories covering differing issues. For—as Kelsen summarises it in his posthumous summation—there is

“no parallel: (1) validity of a norm [is] conditional upon the act of will of which it is the meaning, [and] truth of a statement [is] not conditional upon the act of thought of which it is the meaning; (2)

¹⁵ Cf. Ekelöf ‘The Expression...’ [note 4], p. 62, regarding the Swedish language, and regarding the Danish one, Alf Ross ‘Validity and the Conflict between Legal Positivism and Natural Law’ *Revista Jurídica de Buenos Aires* (1961) 4, pp. 46–93, reprinted in *Normativity and Norms* [note 7], pp. 147 et seq. at pp. 158–159.

¹⁶ George C. Christie ‘The Notion of Validity in Modern Jurisprudence’ *Minnesota Law Review* 48 (1964) 5, pp. 1049–1079 at p. 1050.

¹⁷ Considering (1) compatibility within the system, (2) empirical experience, and (3) fecundity with explicative force, parallelity is seen as between validity and truth (*prescriptio* and *descriptio*) by Jan Wolenski ‘Truth and Legal Validity’ in *Conditions of Validity and Cognition in Modern Legal Thought* ed. Neil MacCormick, Stavros Panou & Luigi Lombardi Vallauri (Stuttgart: Franz Steiner Verlag Wiesbaden 1985), pp. 205–210 [Archiv für Rechts- und Sozialphilosophie, Beiheft 25], and I[lkka] Niiniluoto ‘Truth and Legal Norms’ in *idem*, pp. 168–190. Cf. also I[lkka] Niiniluoto ‘On the Truth and Norm-propositions’ in *Zum Fortschritt von Theorie und Technik in Recht und Ethik* hrsg. Ilmar Tammelo & Aulis Aarnio (Berlin: Duncker & Humblot 1981), pp. 171–180 [Rechtstheorie, Beiheft 3]. – Martín Diego Farrell *Hacia un criterio empírico de validez* (Buenos Aires: Editoria Astrea de R. Depalma 1972) 126 pp. [Ensayos jurídicos 9] concludes even to the laws’ verifiability upon the basis of MORITZ SCHLICK’s so-called logical empirism. See also N. Hoerster ‘Wirksamkeit’, ‘Geltung’ und ‘Gültigkeit’ von Normen: Ein empiristischer Definitionsvorschlag’ in *Das Naturrechtsdenken heute und morgen* Gedächtnisschrift für René Marcic, hrsg. Dorothea Mayer-Maly und Peter M. Simons (Berlin: Duncker & Humblot 1974), pp. 585–596.

the validity of a norm is its existence, [and] the truth of a statement is a property of the statement; (3) the validity of a norm is relative to time, [and] the truth of a statement is not relative to time.”¹⁸

3. Statism and Dynamism of Law

Actually, law is a system which is both dynamic and open and, as opposed to any view suggesting a static closure,¹⁹ shows various possibilities of feedback for its internal mechanisms of validation.²⁰ The vertical view of how validity originates hierarchically from the apex norm is complemented and eventually replaced by the practice of confirming validity horizontally, or upwardly, in a mutual and circular path between normative sources at similar or differing levels.²¹ As compared with Kelsen’s and Hart’s pyramidal conception based upon the idea of an unidirectional (vertical) derivation, circularity presupposes from the outset the idea of total validity (on the one hand) and a gapless series of partial validities (on the other), made up of acts of mutual confirmation all through legal practice by reference to “rules of smaller scope”, among others.²² According to Jerzy Wróblewski, the possibility that discrepancies or contradictions result from the dynamism of law in practice justifies the differentiation of formal validity into systemic validity

¹⁸ Hans Kelsen *General Theory of Norms* [Allgemeine Theorie der Normen (Vienna: Manz 1979)] trans. Michael Hartney (Oxford: Clarendon Press 1991) lx + 465 pp. on pp. 170–174.

¹⁹ Legal positivism in its dogmatic (extreme) understanding is predisposed to suggest absolute validity with binding force taken as a “Kadavergehorsam”. Alfred Verdross *Abendländische Rechtsphilosophie* (Wien: Springer-Verlag 1958) x + 270 pp. [Rechts- und Staatswissenschaften 16] on pp. 252–254.

²⁰ Torstein Eckhoff ‘Feedback in Legal Reasoning and Rule Systems’ *Scandinavian Studies in Law* 22 (1976), pp. 39–51 {& in <<http://www.scandinavianlaw.se/pdf/22-2.pdf>>}.

²¹ Werner Krawietz ‘Die Lehre von Stufenbau des Rechts – eine säkularisierte politische Theologie?’ in *Rechtssystem und gesellschaftliche Basis bei Hans Kelsen* hrsg. Werner Krawietz & Helmut Schelsky (Berlin: Duncker & Humblot 1984), pp. 255–271. o. [Rechtstheorie, Beiheft 5].

²² Stephen Munzer *Legal Validity* (The Hague: Nijhoff 1972), pp. vii + 74, noting that there is “no single rule at the apex of a legal system which serves as the touchstone of validity”.

reflecting the extension of the “law in books”,²³ and validity in force covering the domain of the “law in action”.²⁴

Membership of a norm in the legal system and its actual enforceability are increasingly taken as a unity. According to JOSEPH RAZ, the criterion of this unity must be expressed in the recognition that “the rules recognized and enforced in *s* are legally valid in accordance with *s* but are not thereby themselves part of the legal system *s*”. This has regard to the foreign laws invoked by private international law, to the law of religious and ethnic groups, or to the rules of voluntary associations. These show that “validity according to law is broader than membership of the legal system”.²⁵

4. Validity and the Realm outside the Law

Evidently, the legal quality of the system, that is, its validity, cannot be measured by a criterion from within the system. First, the validity of the basic norm has to be posited so that further norms can then be derived from it.²⁶ Validity requires completion by another standard, as well. HANS Kelsen stated:²⁷

²³ Termed as ‘legal validity’ [von Wright *Norm and Action* {note 14}, ch. X, §§ 5–6], ‘intra-systemic validity’ [Scarpelli *Qu’est ce que...* [note 7], ch. VII], ‘constitutional validity’ [Rupert Schreiber *Die Geltung von Rechtsnormen* (Berlin, Heidelberg & New York: Springer 1966) vii + 263 pp. in ch. III, § 2], ‘formal conception of validity’ [Leszek Nowak ‘Cztery koncepcje obowiazywania prawa’ [Four conceptions of the validity of law] *Ruch Prawniczy, Ekonomiczny i Socjologiczny* (1965) 2, pp. 96–104 at pp. 97 et seq.], and—last but not least—‘systemic validity’ [Joseph Raz *The Authority of Law* (Oxford: Oxford University Press 1979) ix + 292 pp., especially on pp. 150 et seq.].

²⁴ Jerzy Wróblewski ‘Three Concepts of Validity of Law’ *Tidskrift utgiven av juridiska föreningen in Finland* 118 (1982) 5–6, pp. 406–419 at 410ff.

²⁵ Joseph Raz ‘Legal Validity’ *Archiv für Rechts- und Sozialphilosophie* LXIII (1977), pp. 339–352 at 342.

²⁶ Eugenio Bulygin ‘Sobre el fundamento de validez’ *Notas de filosofía del derecho* [Buenos Aires] I (1964), pp. 23–33 and Valdés ‘Algunos modelos...’ [note 7], pp. 263–271.

²⁷ Hans Kelsen *General Theory of Law and State* trans. Anders Wedberg (Cambridge, Mass.: Harvard University Press 1945) xxiii + 516 pp. [20th Century Legal Philosophy Series I], pp. 41–42. And Kelsen continues: “The efficacy of the entire legal order is a necessary condition for the validity of every single norm of the order. A *conditio sine qua non*, but not a *conditio per quam*. The efficacy of the total legal order is a condition, not the reason for the validity of its constituent norms. [...] The principle of legitimacy is restricted by the principle of effectiveness.” (p. 119)

“Although validity and efficacy are two entirely different concepts, there is nevertheless a very important relationship between the two. A norm is considered to be valid only on the condition that it belongs to a system of norms, to an order which, on the whole, is efficacious. Thus, efficacy is a condition of validity; a condition, not the reason of validity. A norm is valid because it is efficacious; it is valid if the order to which it belongs is, on the whole, efficacious.”²⁸

In this double understanding of the concept of validity, the legal and the sociological,²⁹ the normative and the real,³⁰ the systemic and the factual finally meet, despite Kelsen’s strict distinction between the domains of “is” and “ought”. This means that the feasibility of any normative expectation can only be grounded by the prevailing factuality. Recognising LUDWIG WITTGENSTEIN’s fundamental ontological fact of language use, HART writes:

“No such question can arise as to the validity of the very rule of recognition which provides the criteria; it can neither be valid nor invalid but is simply accepted as appropriate for use in this way.”³¹

As JOSEPH RAZ formulated it: “Those ultimate rules of recognition are binding which are actually practiced and followed by the courts.”³² Thereby, the “is” evidently grounds the “ought” by unfolding its ontological priority.³³

²⁸ Cf. also Carlos Nino ‘Some Confusions around Kelsen’s Concept of Validity’ *Archiv für Rechts- und Sozialphilosophie* LXIV (1978) 3, pp. 357–377 and Stephen Guest ‘Two Problems in Kelsen’s Theory of Validity’ *The Liverpool Law Review* II (1980) [Jurisprudence Issue], pp. 101–108.

²⁹ E.g., Ekelöf ‘The Expression...’ [note 4], p. 63.

³⁰ Or, legal and real, in Ulrich Klug ‘Rechtslücke und Rechtsgeltung’ in *Festschrift für Hans Carl Nipperdey zum 70. Geburtstag*, hrsg. Rolf Dietz & H. Hübner, I (München & Berlin: Beck 1965), pp. 71–94.

³¹ Hart *The Concept of Law* [note 10], pp. 105–106.

³² Raz ‘Legal Validity’ [note 25], p. 344.

³³ E.g. Heino Garrn ‘Rechtswirksamkeit und faktische Rechtsgeltung: Ein Beitrag zur Rechtssoziologie’ *Archiv für Rechts- und Sozialphilosophie* 55 (1969) 1, pp. 161–181, treats the relationship as a re-transformation from “ought” to “is”. A predictive function concerning the future behaviour of judges is attributed to the notion of validity as an “ought” re-reflected upon “is”—“taken as a complex of social facts”—by Ross ‘Validity and the Conflict’ [note 15], pp. 159–160. Cf. also Ruggero Meneghelli *Il problema dell’effettività nella teoria della validità giuridica* (Padova: CEDAM 1964) 207 pp. [Pubblicazioni della Facoltà di Giurisprudenza dell’Università di Padova 36].

There are a number of other formulations as well. Following WRÓBLEWSKI's pattern,³⁴ for instance, AULIS AARNIO differentiates systemic, factual and axiological concepts of validity to emphasise acceptability in addition to validity and efficacy.³⁵ RALF DREIER offers also a tripartite definition, according to which

“[a] legal norm is valid sociologically when both following it and non-following it are sanctioned; legally, when it is worded so by the competent organ in the procedural way; and morally, when it can be seen as ethically justified.”³⁶

In his turn, among others,³⁷ FRANÇOIS OST distinguishes formal, empirical and axiological concepts of validity so that legality, effectiveness and legitimacy can be shown in intersecting circles as potentialities and stages of development of both the static construction and the dynamic formation of law.³⁸ According to a further, personalist trend, validity lies in the law's idea and the latter's communal recognition.³⁹

Some approaches offer a rather complex perspective. KARL LARENZ enumerates normative, sociological, psychological and ontological understandings of validity.⁴⁰ This is re-echoed by STEPHEN MUNZER's distinction when he questioned “whether something

³⁴ Wróblewski ‘Three Concepts’ [note 24], pp. 409–417.

³⁵ Aulis Aarnio ‘On the Validity, Efficacy and Acceptability of Legal Norms’ in his *Philosophical Perspectives in Jurisprudence* (Helsinki: Societas Philosophica Fennica 1983), pp. 152–163 [Acta Philosophica Fennica 36] and in *Objektivierung des Rechtsdenkens* Gedächtnisschrift für Ilmar Tammelo, ed. Werner Krawietz, Theo Mayer-Maly, & Ota Weinberger (Berlin: Duncker & Humblot 1984), pp. 427–437. For a similar tripartite division, see B. Bouckaert ‘Gelding en bindende kracht van de rechtsnorm in rechtsdogmatiek, rechtssociologie en rechtsfilosofie’ *R. W.* (1975), No. 20, pp. 1217–1242.

³⁶ Ralf Dreier ‘Recht und Moral’ [1980] in his *Recht – Moral – Ideologie* Studien zur Rechtstheorie (Frankfurt am Main: Suhrkamp 1991), p. 194 [Suhrkamp Taschenbuch Wissenschaft 344].

³⁷ With ‘obligatoriness’—[Lippold ‘Geltung...’ [note 1], pp. 463–489—or a ‘*de lege ferenda* ideality’ [Schreiber *Die Geltung...* [note 23], pp. 58 et seq.—as the third element.

³⁸ François Ost ‘Validité’ in *Dictionnaire encyclopédique de théorie et de sociologie du droit* 2^e éd. corrigée et augmentée, dir. André-Jean Arnaud (Paris: Librairie Générale de Droit et de Jurisprudence 1993), pp. 635 and 638.

³⁹ Ken Takeshita ‘Der Geltungsgrund des Rechts’ *Kansai University Review of Law and Politics* (March 1981), No. 2, pp. 1–14.

⁴⁰ Karl Larenz *Das Problem der Rechtsgeltung* (Berlin: Springer 1929 [reprint (Darmstadt: Wissenschaftliche Buchgesellschaft 1967)]) 46 pp. [Libelli 253], pp. 9 et seq.

is able to produce or accomplish what is appropriate or intended” (standing for validity and efficacy), and “whether or not something is in being” (standing for existence).⁴¹

All these variations of conceptualisation are in the final account mere attempts to delimit the border line that can be drawn between the realms of “is” and “ought” through defining the latter’s boundaries, quality, sources, and powers, as well as the mechanism of its working.⁴² This is an impossible yet, notwithstanding, unavoidable task. According to one of Kelsen’s earliest realisations, entering—by making—the law is “a great mystery”⁴³ that can at the most be hypothesised but not derived. For we are either within or without the law; we can only enter it by a previous declaration of having already been within; paradoxically—as with any *deus ex machina* solution—this declaration presupposes (by having advanced ideally and been posited as a logical premise) exactly that which we cannot derive in an analytically consequential way. For the stepping stones of derivation are either premises already presumed implicitly from the beginning or they are argued actually (and arguable at all in principle) circularly all around, based upon that which should have been proved.

5. Dissolution of the Notion of Validity?

Legal realism—based upon everyday professional experience in Anglo-American and Nordic laws—is characterised by a more differentiated conceptual representation, solving the doctrinally oriented understanding of validity in the actual practice of conferring power.

“Validity is a concept special to institutional normative orders, since it is the conceptual tool for distinguishing between that which is operative within the system and that which is not.”⁴⁴

⁴¹ Munzer *Legal Validity* [note 22], passim.

⁴² Rather simply, e.g., by Karl Engisch in his *Auf der Suche nach der Gerechtigkeit* Hauptthemen der Rechtsphilosophie (München: Piper 1971) xv + 290 pp., in ch. II: »Die Geltung als Merkmal des Rechtsbegriff«.

⁴³ Hans Kelsen *Hauptprobleme der Staatsrechtslehre* entwickelt aus der Lehre vom Rechtssatze (Tübingen: Mohr 1911) xvii + 709 on p. 411.

⁴⁴ Neil MacCormick ‘Powers and Power-conferring Norms’ in *Normativity and Norms* [note 7], pp. 500–501.

This rather pragmatic approach suggests from the beginning that validity is not a property inherent in any way *in se* and/or *per se* in the norm itself. Validity can only be revealed, ascertained and confirmed through an act of interpretation taking place in a linguistic game,⁴⁵ and this is to say that both law and procedure, theory of games and linguistic use are also in a position to afford relevant aspects.⁴⁶ All this concludes by stating that systemic validity is self-related and auto-referential;⁴⁷ moreover, the practice of validity confirmation is eventually self-closing: it draws its own boundaries incessantly and consequently whilst it makes the expectations addressed to its own operation fulfilled.⁴⁸ This autopoiesis in practice explains why validity is seen by some authors more as a priority list of expectations to be met preferentially in a complex of practical setting than a simple catalogue enumerating exhaustively all criteria that are of a *sine qua non* character and are to be fulfilled absolutely.⁴⁹

⁴⁵ M. Vanquickenborne 'Quelques réflexions sur la notion de validité' *Archives de Philosophie du Droit* XIII: Sur les notions du contrat (Paris: Dalloz 1968), pp. 185–194. For a criticism, see Schreiber *Die Geltung...* [note 23], p. 159. It is to be noted that Wróblewski ['Three Concepts' {note 24}, p. 409] considers the "formal and interpretative consequences" of the enacted valid norms the natural components of systemic validity.

⁴⁶ "[I]t is the users of language who author and judge the same language." [„les usagers de la langue en sont à la fois les auteurs et les juges.”] François Ost 'Le code et le dictionnaire: Acceptabilité linguistique et validité juridique' *Sociologie et sociétés* XVIII (avril 1986) 1, pp. 59–75. Cf. also with François Ost & Michel van de Kerchove *Jalons pour une théorie critique du droit* (Bruxelles: Publications des Facultés universitaires Saint-Louis 1987), pp. 217–314 [Travaux et recherches 9] and in particular at pp. 309 et seq. as well as his 'Essai de définition et de caractérisation de la validité juridique' in *Droit et pouvoir* dir. François Rigaux & Guy Haarscher, I: Validité (Bruxelles: Story-Scientia 1987), pp. 97–132 and, as to the application of the point of view offered by the theory of games, pp. 312 et seq.

⁴⁷ By Niklas Luhmann, *A Sociological Theory of Law* trans. Elizabeth King & Martin Albrow (London, Boston, Melbourne & Henley: Routledge-Kegan Paul 1985) xiii + 421 pp. [International Library of Sociology], p. 285 and 'Die Geltung des Rechts' *Rechtstheorie* 22 (1991) 3, pp. 273–286.

⁴⁸ Cf. Varga *Lectures...* [note 11], passim.

⁴⁹ "[I]n comparison with the speech act theory, rather than requiring that all conditions be positively satisfied, the proposed schema [of validity] requires only that a given condition not be shown not to have been satisfied". Stanley L. Paulson 'Neue Grundlagen für einen Begriff der Rechtsgeltung' *Archiv für Rechts- und Sozialphilosophie* 65 (1979) 1, pp. 1–19. Invoking the speech act theory may be revealing indeed, albeit it may also indicate the way in which the original dilemma is misconceived. For what is a form of existence, *a priori* to any operation logically when the law is selected doctrinally, is treated as an off-chance end-product of incidental processes. In practice, it is the pragmatism of mere routine (avoiding an exhaustive derivation of validity in everyday cases by at most raising controlling questions)

Within the framework and intellectual horizon of contemporary pragmatism, Scandinavian legal realism is the trend that has transformed value as an axiological element into a social psychological phenomenon that results, stepping back from acts of social identification and action, in the common acceptance that the law is obligatory. "An order is created once partners to it are agreed upon accepting it together."⁵⁰ This is the background that justifies ALF ROSS concluding that

"Validity in the normative sense has no function in describing and explaining reality. Its function is to reinforce the legal system by proclaiming that the legal obligations of the system are not merely legal obligations backed up by sanctions, but also moral duties. The normative notion of validity is an ideological instrument supporting the authority of the state."⁵¹

This self-destruction of the very idea of validity has served as a pattern for the discursive theory of law with the claim of optimum consensus in its background within the conceptualisation of the State as a democratic *Rechtsstaatlichkeit*⁵² that, once accepted, has ascribed a consensus-dependent context to the ideal of validity;⁵³ moreover, it has even elevated it to serve as its sole criterion⁵⁴ in the long and open-chanced process of the

that substitutes for genuine derivation. There is no need to say that this substitution both symbolises and, thereby, also symbolically re-affirms total (gapless and jumpless) derivation. Or, in the economy of the practical, one may resort to substitute forms and procedures without actually replacing them: sublating but eventually not eliminating the original function.

⁵⁰ Eckhart K. Heinz '»Geltung« und »Verbindlichkeit« im Bereich normativer Ordnungen' *Archiv für Rechts- und Sozialphilosophie* 55 (1969) 3, pp. 355–366. For an earlier advance, see Alf Ross *On Law and Justice* (Copenhagen: Munksgaard 1958) 383 pp. at pp. 36–38.

⁵¹ Ross 'Validity and the Conflict' [note 15], pp. 147–163.

⁵² Jürgen Habermas *Faktizität und Geltung* Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats (Frankfurt am Main: Suhrkamp 1992) 666 pp.

⁵³ Cf., e.g., *Rechtsgeltung und Konsens* hrsg. Eugen Dietrich Graue & Günther Jakobs (Berlin: Duncker & Humblot 1976) 139 pp. [Schriften für Rechtsatheorie 49].

⁵⁴ Cf., e.g., K. Lüderssen 'Juristische Topik und konsensorientierte Rechtsgeltung' in *Europäische Rechtsdenken in Geschichte und Gegenwart* Festschrift für Helmuth Coing zum 70. Geburtstag, hrsg. Norbert Horn, I (München: Beck 1982), pp. 549–564.

apparent dissolution and transitory transformation of the very core element of the concept.⁵⁵

⁵⁵ For further issues in quest for validity, cf. Robert Alexy *Begriff und Geltung des Rechts* 2nd ed. [1992] (Freiburg/Breisgau: Alber 1994) 215 pp. [Alber-Reihe Rechts- und Sozialwissenschaft]; Enrique Barros *Rechtsgeltung und Rechtsordnung Eine Kritik des analytischen Rechtsbegriffs* (Ebelsbach: Gremer 1984) ix + 96 pp. [Abhandlungen zur rechtswissenschaftlichen Grundlagenforschung 60]; by Amadeo G. Conte 'Studio per una teoria della validità' *Rivista internazionale di Filosofia del diritto* XLVII (1970), pp. 331–354 and 'Validità' in *Novissimo Digesto Italiano* XX (Torino: UTET 1974), pp. 418–425; María José Fariñas Dulce *El problema de la validez jurídica* (Madrid: Civitas 1991) 138 pp. [Cuadernos Civitas]; Gerhart Husserl *Rechtskraft und Rechtsgeltung Eine rechtsdogmatische Untersuchung, 1: Genesis und Grenzen der Rechtsgeltung* (Berlin: Springer 1925) xiv + 198 pp.; Arthur Kaufmann *Das Gewissen und das Problem der Rechtsgeltung* (Heidelberg: Müller 1990) ix + 25 pp. [Schriftenreihe Juristische Studiengesellschaft Karlsruhe 190]; Ulfried Neumann 'Theorien der Rechtsgeltung' in *Gegenkultur und Rechts* hrsg. Wilfried Hassemer & Volkmar Gessner (Baden-Baden: Nomos 1985), pp. 21–41 [Schriften der Vereinigung für Rechtssoziologie 10]; Kazimierz Opalek 'The Problem of the Validity of Law' *Archivum Iuridicum Cracoviense* III (1970), pp. 6–18; Ken Takeshita 'Recht und Geltung' *Kansai University Review of Law and Politics* (March 1980), No. 1, pp. 1–19; Robert S. Summers 'Toward a Better General Theory of Legal Validity' *Rechtstheorie* 15 (1984) 4, pp. 65–83; by Csaba Varga, 'Geltung des Rechts – Wirksamkeit des Rechts' in *Die gesellschaftliche Wirksamkeit des sozialistischen Rechts* ed. K[arl] A. Mollnau (Berlin[East] 1978), pp. 138–145 and 'Heterogeneity and Validity of Law: Outlines of an Ontological Reconstruction' in *Rechtsgeltung* ed. Csaba Varga & Ota Weinberger (Stuttgart: Franz Steiner Verlag Wiesbaden 1986), pp. 88–100 [Archiv für Rechts- und Sozialphilosophie, Beiheft 27] {both reprinted in his *Law and Philosophy Selected Papers in Legal Theory* (Budapest 1994), pp. 35–42 and 20–218 [Philosophiae Iuris]}, as well as *The Place of Law in Lukács' World Concept* (Budapest: Akadémiai Kiadó 1985 [reprint 1998]) 193 pp., passim; by Hans Welzel, *An den Grenzen des Rechts Die Frage nach der Rechtsgeltung* (Köln: Westdeutscher Verlag 1966) 32 pp. [Veröffentlichungen der Arbeitsgemeinschaft für Forschung des Landes Nordrhein-Westfalen: Geisteswissenschaften 128] and 'Macht und Recht, Rechtspflicht und Rechtsgeltung' in *Festschrift für K. G. Hugelmann zum 80. Geburtstag*, hrsg. Wilhelm Wegener, II (Aalen: Scientia Verlag 1959), pp. 833–843 {& reprinted in his *Abhandlungen zum Strafrecht und zur Rechtsphilosophie* (Berlin: Walter de Gruyter 1975), pp. 288–296 & <http://books.google.hu/books?id=vZ_f61pI70UC&pg=PA288&lpg=PA288&dq=welzel+%22macht+und+recht%22&source=bl&ots=63vgA7ghc&sig=mUXP7--OrMoknbBYa_3m9fTya0&hl=hu=&ei=VdFZS6SwMc-OsAb49XCAw&sa=X&oi=book_result&ct=result&resnum=1&ved=0CAcQ6AEwAA#v=onepage&q=welzel%20%22macht%20und%20recht%22&f=false>; Jerzy Wróblewski 'Problems of Objective Validity of Norms' *Rechtstheorie* 14 (1983) 1, pp. 19–28.

EX POST FACTO LEGISLATION*

Ex post facto legislation is regulation in a style which usually prescribes a negative sanction with punitive consequences in law for an action performed prior to the law's coming into force.

There is a technical, pragmatic, and, at the same time, deeply moral question behind the decision as to whether it is allowable and whether it is worthwhile. For a long time law had permitted this; jurisprudence could only conclude that the retroactive effect of a rule is not excluded by any legal assumption.¹ Its validity cannot be disturbed by the fact that it declares an act to have been a crime after the fact.²

A decisive answer was first given on the European continent when criminal procedure was surrounded with legal guarantees. Recognition of the principles *nullum crimen sine lege* [no crime without legislation] and *nulla poena sine lege* [no punishment without legislation] expressly interdicted making a deed punishable or meting out a penal sanction without a prospective statutory decree. Some early modern constitutions excluded retrospectivity with moral overtones, for example, the Norwegian Constitution, and the 1784 New Hampshire Constitution:³ "Retrospective laws are highly injurious, oppressive, and unjust. No such laws, therefore, should be made, either for the decision of civil causes, or for the punishment of offences." The German Constitution [*Grundgesetz*] restricts this prohibition and limits it exclusively to substantive criminal law.⁴ Moreover, German constitutional jurisprudence limits it further to cases no longer under adjudication, distinguishing the original from the nonoriginal

* In its first version, 'Ex post facto Legislation' in *The Philosophy of Law An Encyclopedia*, ed. Christopher Berry Gray (New York & London: Garland Publishing 1999), pp. 274–276 [Garland Reference Library of the Humanities 1743] & <<http://www.bookrags.com/tandf/ex-post-facto-legislation-tf/>>.

¹ Felix Somló *juristische Grundlehre* (Leipzig: F. Meiner 1917) xv + 556 pp. at p. 302.

² David Lyons *Ethics and the Rule of Law* (Cambridge: Cambridge University Press 1984) x + 229 pp. on p. 76.

³ New Hampshire Constitution (1784) in <<http://www.nh.gov/constitution/billofrights.html>>, Part I, Article 23.

⁴ German Constitution [*Grundgesetz für die Republik Deutschland* in <<http://www.gesetze-im-internet.de/bundesrecht/gg/gesamt.pdf>> resp. <http://www.bundestag.de/interakt/informationssysteme/material/fremdsprachiges_material/downloads/ggEn_download.pdf>] (1949), Article 103, Paragraph 2.

retroactive effect. As to Common Law, analytical examination of the law embodied in precedents has proven long ago that judicial decisions which create a decision rule have an *ex post facto* effect as well.⁵

Theoretically, since it is a means of social engineering, law is mostly prospective and makes use of regulation that links legal consequences to future events. As a program for social reform, trying to influence with prohibition and repression is less successful than offering a model for behaviour that includes advantages because of being surrounded by positive sanctions.

Modern formal law is primarily the means for mediating relationships toward a network of ascriptions. Thus, it is of primary importance to provide regulations providing normative determination for behaviour. A secondary consideration is that inasmuch as the regulation is kept secret and does not become cognisable or available or bears a retroactive effect, it will not have the chance to influence the behaviour law seeks.

Since the debate between H. L. A. HART and LON FULLER as to the conflict between HITLER and the SA [*Sturmabteilung*] for murdering its leaders in Nazi Germany,⁶ Anglo-American legal thought has seen legislation with retroactive effect as a moral dilemma and, according to ROBERT SUMMERS, has made it a precondition that “the citizen will have a fair opportunity to obey the law”.⁷ Overuse and abuse of a tool, however, is never the fault of the tool. According to FULLER, the same technical means can be used “to cure irregularities of form” under special and unavoidable circumstances.⁸

This question was dramatically raised after World War II when, preparing for the Nuremberg and Tokyo trials, the victors had to consider retrospective prosecution and indictability for actions that were justifiable

⁵ John Chipman Gray *The Nature and Sources of the Law* 2nd ed. [1921] (New York: Macmillan 1948) xviii + 348 pp. on pp. 89–101 & 218–233.

⁶ H. L. A. Hart ‘Positivism and the Separation of Law and Morals’ *Harvard Law Review* 71 (1958) 4, pp. 593–629.

⁷ Robert S. Summers *Lon L. Fuller* (London: Arnold 1984) xiii + 174 pp. [Jurists: Profiles in Legal Theory] at p. 37

⁸ Lon L. Fuller *The Morality of Law* (New Haven: Yale University Press 1964) viii + 202 pp. [Storrs Lectures on Jurisprudence, 1963] on p. 54 and Martin P. Golding ‘Retroactive Legislation and Restoration of the Rule of Law’ in *Jahrbuch für Recht und Ethik / Annual Review of Law and Ethics* 1 (1990), pp. 169–192 {with abstract in <<http://www.str2.jura.uni-erlangen.de/hruschka/JRE/vol01/al-goldi.htm>> & reprint in his *Legal Reasoning, Legal Theory, and Rights* (Aldershot & Burlington, VT: Ashgate 2007), pp. 239–262 [Collected Essays in Law]}.

under domestic (respectively, German and Japanese) laws in force at the time. As discussed by GUSTAV RADBRUCH, they had to choose whether to use regulations with retroactive effect, or to employ natural law over the positive law, the dilemma of the contradiction between a ‘statutory no-law’ [*gesetzliches Unrecht*] and the ‘supra-statutory law’ [*übergesetzliches Recht*].⁹

Recently, the collapse of Communism raised the burning question in Central and Eastern Europe as to whether the legal processing of deeds instigated by former Socialist states could finally begin or whether, because the passing of time had exceeded the time limits set by statutory decree, the long-persisting and cruel state crimes could avoid control by the rule of law. These acts ran against the penal codes applicable at the time but remained unprosecuted because of the state’s complicity in their formal exclusion from prosecution, in some cases by a specific classified decree. The Hungarian legislator in 1991 held that the illegal institutionalisation of the state’s machinery to abet avoidance of official criminal prosecution notionally excludes the start of the “tolling” period.¹⁰ The Hungarian Constitutional Court rejected this by reason of its own doctrinal construction of a “constitutional criminal law”, that is, the primary need for legal security deriving from the constitutional principle of “the rule of law”.¹¹ A few years later, German and Czech laws,¹² and the Czech Constitutional Court’s assessment of the latter¹³ declared that lapse of time was a procedural question, which removed it from under the original prohibition against their retroactive force.

On the merits, however, neither law considered it justifiable to apply the limitation period, which presumes a rule of law, in conditions which actually deny any rule of law. The Czech Constitutional Court decision unambiguously declares:

⁹ Gustav Radbruch *Rechtsphilosophie* 4th ed. [1946] (Stuttgart: K. F. Koehler 1950) 391 pp. especially at pp. 34 et seq.

¹⁰ The Bill No. 2961 presented by MPs ZSOLT ZÉTÉNYI and IMRE TAKÁCS and voted by the Parliament in May 1991.

¹¹ Hungarian Constitutional Court decision No. 11 on March 3, 1992.

¹² The German Laws of March 26 and September 27, 1993 [*Gesetz über das Ruhen der Verjährung bei SED-Unrechtstaten & Gesetz zur Verlängerung strafrechtlicher Verjährungsfristen*], and the Czech Law No. 198 of July 9, 1993 [*Zákon o protiprávnosti komunistického režimu*], respectively.

¹³ Czech Constitutional Court decision No. 19 on December 21, 1993.

“If we interpret the time passed since the commission of these crimes as a prescription period [...] this would be equivalent to confirming the »legal security« which the perpetrators had from the very beginning of their activity, and which was actually incorporated into their official immunity from prosecution. The »legal security« of the perpetrators, in this sense, would be equivalent to the legal insecurity of the citizens [...]. Any solution different than this would inevitably mean that the regime of totalitarian dictatorship receives a certification for its »rule of law«; this would create a dangerous precedent for the future. More precisely, this would confirm that crime can go unpunished, if and insofar as it is committed in mass proportions, is well-organised, lasts for a long time, and falls under the protection of state authorisation.”^{14;15}

¹⁴ Cf. in original *fac simile* in *Coming to Terms with the Past under the Rule of Law* The German and the Czech Models, ed. Csaba Varga (Budapest 1994) xxvii + 176 pp. [Windsor Klub] on pp. 145–169.

¹⁵ In Hungary, only the National Credo serving as preamble to the new Basic Law (April 25, 2011) could introduce the position according to which “We reject the applicability of statute of limitations to the inhuman crimes committed against the Hungarian nation and its citizens during the reign of the national socialist and the communist regimes.”

ON CONCEPTUALISING
BY LOGIFYING THE LAW

RULE AND/OR NORM

Or the Conceptualisability and Logifiability of Law*

1. Rule / Norm [69] 2. Origins and Contexture [70] 3. With Varied Denotations [73] 4. Norms Exclusively in Civil Law *Rechtsdogmatik* [74] 5. Ambivalence in Language Use [77]

1. Rule / Norm

From the wide range of linguistic expressions and other objectifications used in the direction of behaviour,¹ the dilemma of rule and/or norm is not a scholarly issue in a direct sense. It can be derived neither from the historical etymology of the relevant words nor from investigations into the history of ideas that inspire or merely match one or another language use. Clear-cut distinctions of meaning regarding these two terms are not specified either according to various historical periods or the historical cultures of law and legal thought, which have developed diversely so far. Although their regular usages may be different when compared to each other, in

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¹ Kazimierz Opalek *Theorie der Direktiven und der Normen* (Wien & New York: Springer 1986) 178 pp. [Forschungen aus Staat und Recht 70] lists on p. 88 norm, rule and principle, alongside persuasion, wish, proposal, request, supplication, advice, warning, recommendation, and encouragement, as directions of behaviour. In such a broad sense, see Mihály Szo-tácsky 'A normák eredete és funkciója' (Genese und Funktion der Normen) in *Tanulmányok Szamel Lajos tiszteletére* ed. Antal Ádám (Pécs 1989), pp. 227–238 [Studia Iuridica auctori-tate Universitatis Pécs publicata 118].

most attempts at a theoretical definition they are still decisively referred to as synonyms,² that is, as concepts able to substitute nearly completely for one other.³ Therefore, which usage is preferred by which language and culture depends for the most part on mere habits of parlance. However, these habits may then—through the latent creative (socially constructive) force of the more or less consolidating use of language—become organised into certain blocks, and these blocks may from then on, in their own manners and ways, generate additional meanings with specifications according to context that may, for their own part, also eventually lead to a separation providing some basis for added theorisation.

2. Origins and Contexture

The term ‘rule’ [‘règle’, ‘regel’, ‘regola’, ‘regla’] originates from the Latin ‘regula’, while ‘norm’ stems from Latin ‘norma’ as used to denote a tool applied by masons and carpenters in ancient Rome to draw a straight line. In its present sense, ‘norm’—as mostly seen in its derivatives ‘normal’, ‘normality’, etc.—is a product of 19th-century development, differentiating and homogenising human conditions, social processes and attitudes of production by adjusting them to previously set standards. To denote ‘standard’, the term ‘norm’ was first used in pedagogy and then in health care, and later on, during the same century, it was also extended to standardisation in production and technology, isolating, defining, combining and re-organising industrial processes as a series of patterns.⁴

² “The rule is a synonym for »norm« or »directive« taken as the declaration of a prescriptive function.” J[erzy] W[róblewski] ‘Règle’ in *Dictionnaire encyclopédique de Théorie et de Sociologie juridique* dir. André-Jean Arnaud (Paris: Librairie Générale de Droit et de Jurisprudence 1988), p. 346. An even simpler solution is proposed by *The Philosophy of Law* An Encyclopedia, I–II, ed. Christopher Berry Gray (New York & London: Garland Publishing 1999) [Garland Reference Library of the Humanities 1743], with the entry ‘Rule’ referred to but speaking about nothing but ‘Norms’ eventually.

³ This is illustrated by the way how in case even of an otherwise minutely precise author—e.g., Marijan Pavčnik in his ‘Pravno pravilo’ *Zbornik znanstvenih razprav* [Ljubljana] (1995), No. 55, pp. 217–240 and ‘Die Rechtsnorm’ *Archiv für Rechts- und Sozialphilosophie* 83 (1997) 4, pp. 463–482—, one term is simply replaced by the other when changing between languages.

⁴ Cf., e.g., Georges Foucault *Surveiller et punir* Naissance de la prison (Paris: Gallimard 1975) 318 pp. [Bibliothèque des histoires], p. 186 and Georges Canguilhem *Le normal et le pathologique* 4^e éd. (Paris: Presses Universitaires de France 1979) 224 pp. [Quadrige], p. 175.

Let us mention, as an illustrative example of incidentalities in the history of the use of words, that in its original meaning, ‘rule’ once served to express some basic wisdom or *adage*, summarising the versatility of Roman jurists indefatigably searching for the principles of a justifiably right solution; instead of the causal succession meant by the expression of “if [...], then [...]”, implying conditional repetition firstly describing and, then, partly prescribing those facts which may in their conceptual generality constitute a case and, partly, also ascribing a sanction to them.⁵

According to its philosophical definition, a rule is a “formula indicating or prescribing what is to be done in a certain situation”, noting that its prescriptive use affords a criterion with selective force, and that no such use shall be overshadowed by those recently spreading constative uses that are—mostly as connected with the senses of ‘regular/irregular’ or ‘regularity’, etc.—worded as if they were merely descriptive.⁶

On the other hand, a norm is the “concrete type or abstract formula of what has to be done, at the same time including a value judgement in the form of some kind of ideal or rule, aim or model”; we should note that norms are mostly formulated to express some logical thought or act of will, free representation or emotion, or ideal of beauty.⁷

While norm is a “synonym of »rule«” (with the latter regarded as somewhat “more general”⁸ or “more wide and generic”), it is remarkable that in everyday usage a rule is still primarily an explicit or posited formulation as the in-itself neutral and historically accidental outcome of some ‘rule-enactment’ or ‘regulation’, while a norm is either the logical (logified) form of the above or the logical (normative) prerequisite of an act of regulation itself.

⁵ For more details, see, by the present author, *A jogi gondolkodás paradigmái* 2nd ed. [of *Lectures on the Paradigm of Legal Thinking*, 1996] (Budapest: Akadémiai Kiadó 2004) 504 pp. on pp. 33–34.

⁶ André Lalande *Vocabulaire technique et critique de la philosophie* [1926] (Paris: Presses Universitaires de France 1991), pp. 906–907. According to Ota Weinberger’s similar formulation—‘The Role of Rules’ *Ratio juris* 1 (December 1988) 3, pp. 224–240, especially para. 1, pp. 225 et seq., “Rules are advice to be used in determining action.”

⁷ M[ichel] T[roper] & D[anièle] L[ochak] ‘Norme’ in *Dictionnaire encyclopédique...* [note 2], p. 691.

⁸ E.g., J.-F. Perrin ‘Règle’ in *Archives de Philosophie du Droit* 35: Vocabulaire fondamental du droit (Paris: Sirey 1990), pp. 245–255.

⁹ Patricia Borsellino ‘Norms’ in *The Philosophy of Law* [note 2], pp. 596–598, especially on p. 596.

This explains why ‘rules’ may either draw from experience¹⁰ or govern a game, e.g., of the law [*Spielregeln* & *Rechtsregeln*]. All of this is unproblematic in so far as we are interested in them as the manifestation of, or access to, something. As to its apparent pair, ‘norms’ enter the scene when the rule’s intended or probable notation becomes problematic and requires further investigation in a way that, proceeding from the rule as the presentation of something made accessible to us, we start searching for an identifiable message by means of the former’s logical (etc.) analysis.

It is surely not by mere chance that we can hardly speak of ‘creation of norms’; and we only speak of ‘provision of norms’ when we intend to emphasise either the field as being “normed” (ordained under regulation) or the artificiality of that regulation. Notwithstanding, present-day literature suggests as a logical proposition the idea that a norm can be separated out of a rule by its mere linguistic formulation. Actually, however, it is not the rule but the norm that is considered, as well as treated, in an onto-epistemological (and psychological and logical, etc.) perspective in order to be able to interpret it both as an enunciation and as the contents of denotation (inherent, among others, in a psychologically examinable act of will).¹¹

The above seems to be substantiated by the fact that while in the English language, for instance, historical dictionaries specify more than twenty entries of meaning and fields of application for the single word ‘rule’, each of these is still related exclusively to the availability or prevalence of a given measure of behaviour, either indicating or merely carrying and/or enforcing it, without any of them claiming even incidentally that the rule itself can serve as the *denotatum* (with the objectification itself or its communication embodying this very measure either through its textuality and grammatical make-up or owing to the logical interrelationship among its elements).¹² Moreover, the pervasive strength of the English language mentali-

¹⁰ *Ibid.*

¹¹ For the former, see, above all, Carlos E. Alchourrón & Eugenio Bulygin *Normative Systems* (Wien & New York: Springer 1971) xviii + 208 pp. [Library of Exact Philosophy 5], and, for the latter, Hans Kelsen *Allgemeine Theorie der Normen* (Wien: Manz 1979) xii + 362 pp., passim, especially paras. 1–10, and explicitly para. 1, passage III.

¹² *The Compact Edition of the Oxford English Dictionary* Complete Text Reproduced Micrographically, I–II (Oxford: Oxford University Press 1971), pp. 2599–2600. In incidences far away in the past, such examples may affirm this: “eos riwle” [*Ancren Riwle* a (1225) {2 (Camden Soc. 1853)}] or “e pope [...] forsook e rule of e olde tyme” [*Polychronicon Randulphi Higden* (tr. 1387), VII, 431 {Rolls series 1865–1867}] (original edition of the *Oxford English Dictionary*, p. 881, column 3 and p. 882, column 1, respectively). Against the historically established use, it is exclusively the modern (and, in a linguistic sense, rarer) pro-

ty is shown by the fact that not even the amazingly late and slow spread of the word ‘n o r m’ provoked any change. That is, in English, until linguistic analysis grew into the main trend of moral philosophising in the first decade of the 20th century, the word ‘norm’ had exclusively been used to refer to some standard, pattern or measure made available, and by no means in order to imply that the standard, pattern or measure itself could have been embodied (objectified) by it in such a way that one, and exclusively one, single correct meaning could be extracted from such an embodiment.¹³

In language use, we do not to talk about ‘logic of rules’ instead of ‘logic of norms’. In no way in everyday practice do we equate the two terms with each other. Only a ‘logic of norms’ can be thought of, while accepting in advance that nothing but linguistic propositions conceived of (or prepared so as to serve) as logical units can be subjected to either a logical operation or any genuine linguistico-logical analysis.

3. With Varied Denotations

All this may lead us to the conclusion that in actual practice and according to a nominal definition, ‘r u l e’ and ‘n o r m’ denote the same thing, the former being considered from the point of view of making it accessible (communicable) as a message and the latter from that of logic, of internal coherence and consequentiality of contents. Yet regarding either their *genus proximum* or *differentia specifica*, we have to realise that both their conceptual volume and their extension will be different. For no norm can be found in a rule, although the mental reconstruction of its message may generate one. Or a rule may refer to a norm by forecasting the chance that a norm can be reconstru(ct)ed through—and as mediated by—it. For in itself, rule is but a specific linguistic expression, while in logic the norm states an abstract logical relation. They have in common the fact that neither of them can stand by itself. A rule may come to being if thematised

fessional usage that can attribute the word such a meaning: “Either according to the rules of the common law, or by the operation of the Statute of Uses.” *Penny Cyclopædia of the Society for the Diffusion of Useful Knowledge* (1842), XIX, 379/2 (*Oxford English Dictionary*, p. 882, column 2).

¹³ It is to be noted that, from 1676 on, the word appeared in the form of ‘*norma/normae*’, always italicised as a borrowance from the Latin, and started to spread as ‘*norm*’ only from 1885, albeit between 1821 and 1877 mostly in pairs of synonyms such as, e.g., ‘*norm or model*’, ‘*norm and measure*’ or ‘*norm or principle*’. *Ibid.*, p. 1942 (p. 207, column 3).

(expressed, declared, posited, etc.) as such, and a norm, if a logical form is given as a result of mental operations in an intellectual (re)construction. Notwithstanding all this, they are not related as to form and content to one another. Moreover, they are not co-extensive. After all, rules differing by language, culture, structure and expression (etc.) may be logified as expressing the same norm and the same rule (in case of intentional or unintentional ambiguity, or because of the omission of punctuation or misprinting, etc.) may serve to reconstruct differing norms.

4. Norms Exclusively in Civil Law *Rechtsdogmatik*

In terms of what has been said above, it is the `n o r m` that has become the cornerstone of theoretical system-construction in our continentally rooted `C i v i l L a w`, based upon the axiomatic inclination to logification. It is by no mere chance that the construction of Kelsen's Pure Theory of Law is founded on the *Grundnorm*, as it builds the derivation of validity throughout the entire prevailing law and order on either direct logical or indirect linguistic (conceptual) inference [*Ableitung*]. Accordingly, the norm is conceived as a `l o g i c a l u n i t` that has been generated through logical reconstruction and can be subject to further logical operations. Therefore, it is by no means chance either that both the need for and the conceptual performance of a `d o c t r i n a l s t u d y o f t h e l a w` — with the call for a meta-system strictly conceptualised and rigidly logified upon the law (taken as a thoroughly consistent body of text as concluded from its elements¹⁴) — were formed in the Civil Law.¹⁵ (It is to be noted, too, that a the-

¹⁴ Cf., by the author, 'The Quest for Formalism in Law: Ideals of Systemicity and Axiomatisability between Utopianism and Heuristic Assertion' *Acta Juridica Hungarica* 50 (2009) 1, pp. 1–30 {& <<http://www.akademiai.com/content/k726420g254078j>>} {an abridged version as 'Heuristic Value of the Axiomatic Model in Law' in *Auf dem Weg zur Idee der Gerechtigkeit* Gedenkschrift für Ilmar Tammelo, hrsg. mit Raimund Jakob, Lothar Philipps, Erich Schweighofer & Csaba Varga (Münster, etc.: Lit Verlag 2009), pp. 119–126 [Austria: Forschung und Wissenschaft – Rechtswissenschaft 3]}.

¹⁵ The predominance of the analytical method in applied legal philosophy and the thoroughly constitutionalised doctrine of the law in recent decades may suggest a greatly changed trend today. However, the preference for analysis comes from an external interest and the elitist free thinking development of constitutionalism achieved by the US Supreme Court with academic assistance (i.e., by non-elected fora) has not yet exceeded the impact once exerted by the German doctrine on English legal thought during the second half of the 19th century,

ory of norms serving as a *Rechtsdogmatik* can be erected with no concept of rule implied¹⁶ and a theory of rules dedicated to the law's phenomenal form can also be built up on the exclusive basis of norm-concepts.¹⁷)

On the other hand, the C o m m o n L a w culture—which, instead of striving either for an exhaustive conceptual representation and textual embodiment (objectification) of the law or to re-establish it according to axiomatic ideals, and also instead of reducing security in law to logical deducibility from previously set propositions, rather focusses on social directness, the rectifying medium of everyday experience and feedback drawn from dilemmas of decision on the level of common sense as organically rooted in tradition, as well as the force of social continuity able to provide a framework for both preservation and renewal in the law—does speak in terms of r u l e s as an exemplification of the law, that is, as an accidental manifestation and incidental actualisation in situations when one has to declare what the law is.¹⁸

Yet, if a rule is unconceptualised (without ever being conceptually related, analysed and/or classified), that is, if neither logical c o n c e p t u a l i s a -

which may have enriched the Common Law in both theoretical interpretability and conceptualisation without, however, disassociating it from its own traditions.

¹⁶ Kelsen supplies an illustrative example by avoiding the use of 'rule' (except as an element of the term 'rule of law' with 'rule' meaning just domination or control) in his final theory of norms [note 11].

¹⁷ See below, note 20.

¹⁸ This is well illustrated by literature which, historically drawing from the classical heritage of Jewish and Roman Law to span up to the Anglo-American approach, uses exclusively the term of 'rule' as a phenomenal designation. Cf., e.g., Derek van der Merwe 'Regulae iuris and the Axiomatisation of the Law in the Sixteenth and Early Seventeenth Centuries' *Tydskrif vir die Suid-Afrikaanse Reg* (1987) 3, pp. 286–302; Georges Kalinowski 'L'interprétation du droit: ses règles juridiques et logiques' *Archives de Philosophie du Droit* 30: La jurisprudence (Paris: Sirey 1985), pp. 171–180; Michael Clanchy 'A Medieval Realist: Interpreting the Rules at Barnwell Priory, Cambridge' in *Perspectives in Jurisprudence* ed. Elspeth Attwooll (Glasgow: University of Glasgow Press 1977), pp. 176–194; I. D. Campbell 'Are the Rules of Precedent Rules of Law?' *Victoria University College Law Review* 4 (1956) 1, pp. 7–27; Matthew Jackson 'Austin and Hart on Rules' *Edinburgh Philosophy Journal* (March 1985), pp. 24–26; Irene Merker Rosenberg & Yale L. Rosenberg 'Advice from Hillel and Shammai on How to Read Cases: Of Specificity, Retroactivity and New Rules' *The American Journal of Comparative Law* 42 (1994) 3, pp. 581–598; Cathy A. Frierson 'I Must Always Answer to the Law...« Rules and Responses in the Reformed Vloost Court' *The Slavonic and East European Review* 75 (April 1997) 2, pp. 308–334. In contrast, even in hypothetical situations when some normative staff is expressed in a logifying context, one can mostly encounter a norm-concept. Cf., e.g., Wolfgang Fikentscher *Methoden des Rechts* IV: Dogmatischer Teil (Tübingen: J. C. B. Mohr 1977), ch. 31, para. VIII: »Die Fallnorm« and, in a particularly telling context, Wilfried Hassemer 'Über nicht-juristische Normen im Recht' *Zeitschrift für Vergleichende Rechtswissenschaft* (1984) 1, pp. 84–105.

tion nor any systemic idea stands behind the practical act of denomination,¹⁹ then it is to be doubted whether a *Rechtsdogmatik* can ever be erected upon such a scheme. For no doctrine can be built without norms.²⁰

If and in so far as the norm is a logical unit, the rule is a kind of proposition. As to their environment, norms may stand both on their own and in a systemic context. On the other hand, rules do presuppose principles, standards and policies that can, without being rules themselves, demarcate the sphere of the rules' relevance or applicability.²¹

It is for the "scientific" methodology of the doctrinal study of the law to answer how and to which depth the unlimited (and in principle also illimitable) demand for logical correlation, consequence and coherence may (if at all) be complemented with axiologically founded teleological considerations. Therefore, the introduction of either broader (socially sensitive) definitions (in confronting, e.g., free law to exegesis) or brand new aspects

¹⁹ Cf., by the present author, 'La Codification à l'aube du troisième millénaire' in *Mélanges Paul Amserek* org. Gérard Cohen-Jonathan, Yves Gaudemet, Robert Hertzog, Patrick Wachsmann & Jean Waline (Bruxelles: Bruylant 2004), pp. 779–800 {& 'Codification et recodification: Idées, tendances, modèles et résultats contemporains' in *Studia Universitatis Babeş-Bolyai Iurisprudentia*, LIII (iulie–decembrie 2008) 2 [*La recodification et les tendances actuelles du droit privé* Bblti, 9–12 octombrie 2008], pp. 11–29 & <<http://studia.law.ubbcluj.ro/articole.php?an=2008>>} or as 'Codification at the Threshold of the Third Millennium' *Acta Juridica Hungarica* 47 (2006) 2, pp. 89–117 {& <<http://www.akademiai.com/content/cv56191505t7k36q/fulltext.pdf>> and in *Legal and Political Aspects of the Contemporary World* ed. Mamoru Sadakata (Nagoya: Center for Asian Legal Exchange, Graduate School, Nagoya University 2007), pp. 189–214}.

²⁰ Such a conclusion is facilitated by the unclarified English word usage and also by the fact that, instead of doctrinal study, it was the attempt at an axiomatical foundation of sciences—e.g., George Edward Moore *Principia Ethica* (Cambridge: At the University Press 1903) xxvii + 232 pp. [cf., by the author, *Lectures on the Paradigms of Legal Thinking* (Budapest: Akadémiai Kiadó 1999) vii + 279 pp. [*Philosophiae Iuris*], p. 120]—that became instrumental in developing the linguistic analysis of law in the Common Law world. This very fact has anticipated English legal analysis as not being based on the actual law but on sample sentences hypostatised by authors or—as the early criticism of Herbert Lyonel Adolphus Hart's *The Concept of Law* (Oxford: Clarendon Press 1961) viii + 263 pp. [Clarendon Law Series] had shown—although the analysis is presented in a sociologising manner, yet it is actually constructed without any factual coverage whatsoever. Cf., by the author, 'The Hart-phenomenon' *Archiv für Rechts- und Sozialphilosophie* 91 (2005) 1, pp. 83–95. For an exemplary elaboration, see Geoffrey Samuel *Epistemology and Method in Law* (Aldershot & Burlington, VT.: Dartmouth 2003) xv + 384 pp. [Applied Legal Philosophy].

²¹ Practically the entire oeuvre of Ronald M. Dworkin—starting from his paper on 'The Model of Rules' *University of Chicago Law Review* XXXV (1967)—serves just the explication of this.

(in, e.g., teleological interpretation) in an established discourse in the Civil Law may equally induce debates shattering normativism's basic claim. By contrast, the ascientific approach to law in the Common Law may openly admit that law can only cover the field of practical reason in which sober everyday considerations are used to being given preference.

5. Ambivalence in Language Use

In sum, the dilemma of "rule and/or norm" carries the marks of ambivalence inherent in coupling linguistic conventionalisation with attempts at theoretical (logifying and analytical) system-building. (As a merely practical outcome, it is to be noted that albeit Hungarian language usually refers to legal rules, yet once they are subject to a conceptual operation in doctrine, they are treated as legal norms.²²)

In the final analysis, both can be used as conceptually justified in their own place and within their own context, respectively. For language is used instrumentally and according to established habits, while concepts are formed as mental representations according to homogenising requirements set up by the given theoretical outlook.²³

²² E.g., Vilmos Peschka *Die Theorie der Rechtsnormen* (Budapest: Akadémiai Kiadó 1982) 266 pp. theorises upon norms exclusively, after an obviously similar solution was already resorted to by László Asztalos in his *Polgári jogi alaptan* A polgári jog elméletéhez [A fundamental doctrine of the theory of civil law] (Budapest: Akadémiai Kiadó 1987) 277 pp.

²³ Also cf. Norberto Bobbio 'Norma ginridica' in *Novissimo digesto italiano* XI (Torino: Utet 1965), pp. 330–337; Alf Ross *Directives and Norms* (London: Routledge & Kegan Paul 1968) ix + 188 pp. [International Library of Philosophy and Scientific Method]; Robert Alexy 'Rechtsregeln und Rechtsprinzipien' in *Conditions of Validity and Cognition in Modern Legal Thought* ed. Neil MacCormick, Stavrou Panou & Lombardi Lauro Vallauri (Stuttgart: Steiner 1985), pp. 13–29 [Archiv für Rechts- und Sozialphilosophie, Beiheft 25]; Georgio Robles 'Was ist eine Regel?' in *Vernunft und Erfahrung im Rechtsdenken der Gegenwart* ed. Torstein Eckhoff, L. Friedman & Jirky Uusitalo (Berlin: Duncker & Humblot 1986), pp. 325–338 [Rechtstheorie, Beiheft 10]; E. Wiederin 'Regel, Prinzip, Norm: Zu einer Kontroverse zwischen Hans Kelsen und Josef Esser' in *Untersuchungen zur Reinen Rechtslehre Ergebnisse eines Wiener Rechtstheoretischen Seminars 1985/86*, hrsg. Stanley Paulson & Robert Walter (Wien: Manz 1986), pp. 137–166 [Schriftenreihe des Hans Kelsen-Instituts 11]; Jerzy Wróblewski 'Legal Rules in the Analytical Theory of Law' *Studies in the Theory and Philosophy of Law* [Łódź] 2 (1986), pp. 91–110; J. Combacau 'De la régularité à la règle' *Droits* 3 (1986), pp. 3–10; F. Kratochwil 'Rules, Normes, Values, and the Limits of »Rationality«' *Archiv für Rechts- und Sozialphilosophie* LXXIII (1987) 3, pp. 312–329; S. A. Landers *Rules and the Concept of a Rule in Law and Legal Theory* (Godstone: White Swan House 1991) 459 pp.; G. Kucsko-Stadlmayer 'Rechtsnormbegriff und Arten der Rechtsnorm' in *Schwerpunkte der*

All in all, we have thereby justified the moment of identity, ambivalence and duality inherent in the terminological dilemma of “rule and/or norm”. Despite any remaining conceptual uncertainty, we may find it fortunate that the scholarship that developed in both German and Hungarian language cultures belongs to the orbit of Civil Law, which differentiates between the mere act of signalling the fact that there is a normative message made available and the logically processed conceptual embodiment (objectification) of such a message.

Reinen Rechtslehre hrsg. Robert Walter (Wien: Manz 1992), pp. 21–36 [Schriftenreihe des Hans Kelsen Instituts 18]; C. R. Sunstein ‘Problems with Rules’ *California Law Review* 83 (1995) 4, pp. 953–1026; A. H. Goldman ‘Rules in the Law’ *Law and Philosophy* 16 (1996) 6, pp. 581–602.

LEGAL LOGIC AND THE INTERNAL CONTRADICTION OF LAW*

1. Legal Logic [79] 2. The Internal Contradiction of Law [83]

1. Legal Logic

Legal logic is expected to operate using symbols developed by modern formal logic and obviously it is only through such instrumentalities that the notional scheme and structure of the complex processes of legal reasoning can be represented at all in logic. At the same time, modern formal logic cannot claim—and, by virtue of its reductionism, it also cannot be made to become suitable—to grasp what is distinctively legal¹ in the processes of legal reasoning, thus, above all, the particular way in which the premisses of decision of the so-called judicial syllogism² are formed in the dialectic interplay between (and, individually, inside) fact-qualification and norm-interpretation in the judicial process. For the expectation embodied by the professional deontology of the legal profession on the European continent—according to which (1) decision-making is an axiomatically reconstructible process, (2) the facts established are also actually proved, and (3) the conclusions reached are concluded with the certainty of a logical necessity—remains but an Utopian dream. For both law-making and law-applying are—and cannot be but—helplessly subjective and limited. There is always a space empty of norms as reserved to discretion, which can only

* Originally a preface to, as well as a paper [1971] reprinted in, *A jog mint logika, rendszer és technika* (Budapest: [Osiris] 2000), pp. 7–11 & 54–57, respectively [Jogfilozófiák]. Presented at the IRIS [Internationales Rechtinformatische Symposium] 2004 at Salzburg and published in *Informationstechnik in der juristischen Realität Aktuelle Fragen zur Rechtsinformatik 2004*, hrsg. Erich Schweighofer, Doris Liebwald, Günther Kreuzbauer, Thomas Menzel (Wien: Verlag Österreich 2004), pp. 49–56 [Schriftenreihe Rechtsinformatik 9].

¹ For the term, see Paul Bohannon ‘Law and Legal Institutions’ in *International Encyclopedia of the Social Sciences* 9th ed. David L. Sills (New York: Macmillan & The Free Press 1968), pp. 73–78.

² For a classic formulation, see Chaïm Perelman ‘La distinction du fait et du droit: Le point de vue du logicien’ in *Le fait et le droit Études de logique juridique* (Bruxelles: Bruylant 1961), pp. 269–278 [Travaux du Centre National de Recherches de Logique], p. 271.

be filled by the law's pragmatic functioning and the social determination prevailing in its everyday operation.

Law has a binary language, reminiscent of the MANichean dualism, resulting in an alternative conceptual exclusivity, and a legal decision amounts in principle to voluntarily 'cutting something' (expressed by the French as *trancher un litige*). Moreover, instead of statements serving as premisses, it is rather legal concepts that constitute the basic units of legal reasoning as atomic components: concepts that belong to a meta-layer of language and that, as freely shapeable artifacts, mediate, by establishing the normative connection, between facts and norms in the course of qualification. As is well known, the 'qualification' of 'facts' pre-defines the decision from the beginning, delineating the circle from which the legal consequence(s) can be drawn. In terms of its dichotomising alternative, exclusivity, both the act of subordinating facts to some pre-codified concept(s) and of drawing legal consequences in a more or less mechanical way from them can only take place unconditionally and totally, with no notional (i.e., taxonomic or systemic) alternativity of or division/partition in either qualification or legal inference, that is, with no *reservatio mentalis* as to the feasibility of any further qualification(s). Therefore, once the given facts have been qualified in a given way, the entire relevant regulation at once becomes applicable to those facts. Inversely, the relevance of all other regulations becomes automatically ruled out by the same qualification. An exclusive filtering of processes through conceptual schemes is only characteristic of law and of dogmatically constructed artificial systems such as deductive theology or the rules of games. The same may cast light on the specifically fictitious nature of legal analogy as well. For independent of the nature and/or degree of similarity in real life, analogical qualification can only conclude with—instead of dialectical, partial or conditional similarities—a definite notional intersection, ending in complete formal identification, while also meting out common sanctions. It cannot but include the object into some other class, totally resolving the former (with all its practical consequences) in the latter.

The formalist and anti-formalist approaches³ are usually characterised by an option as to whether an absolute determination of formal procedures by formal rules or a relative non-determination of non-formal procedures

³ For a contemporary overview, cf. Josef Horowitz *Law and Logic A Critical Account of Legal Argument* (New York & Wien: Springer-Verlag 1972) xv + 213 pp. [Library of Exact Philosophy 8].

by non-formal rules is at stake. Such a simplifying view favours formalism, crediting the law with uniformity and consequentiality in procedures and foreseeability in results, as if legal security could exclusively be promoted by the rule of logic, with the utmost exclusion of individual evaluation and discretion from the process. Reality is, however, far from such a simplistic scheme. Defining the role of judges by allowing them a certain degree of autonomy in evaluation is an issue of legal policy considerations. At the same time, the limits of a thorough determination by formal rules are objectively given, independent of any legal policy consideration. It is in fact the taking of such limits into account and the awareness of the direction and mode of how to cope with them that make the formalist and the anti-formalist stands differ from one another in the ultimate analysis. Consequently, instead of being in contrasted antagonistic opposition, they represent mutually presupposing and supplementing methodological attempts at an intellectual reconstruction, offering a logically differentiated description of the various aspects and phases of and expectations towards legal reasoning, taken as a process. Or, the logical visions offered by both formalism and anti-formalism are based upon the same real processes, representing the same reality in differing contexts.⁴

In law, in the final analysis, issues are always dialectic in nature, like queries in everyday practice. Thus, responding to them also presupposes a tirelessly creative search for the hows and whys in practical issues and not an intellectually isolated, purely logical operation, freed from internal contradictions through a purified system of abstracted concepts, in which axiomatic coherence will substitute for any likeness in substance. Therefore, in contrast with theoretical reasoning focussed on the conclusion, practical reasoning is dedicated to the will of decision as a form of activity defying direct reduction to any inductive/deductive formalism. From the point of view of practice, any other theoretical reconstruction can only be a logical game, nothing else.

For instance, thirty-five years ago, the Belgian VANQUICKENBORNE endeavoured to separate “elementary” norms from “abstract” ones,⁵ observing that in contrast with modern codes, which are backed up by a systematic doctrine [*Rechtsdogmatik*], primitive regulations operated mostly

⁴ Cf., by the author, *The Place of Law in Lukács' World Concept* (Budapest: Akadémiai Kiadó 1985) 193 pp. at paras. 5.4.2–3.

⁵ M. Vanquickenborne [discussion] in *Études de logique juridique* IV: Le raisonnement juridique et la logique déontique: Actes de Colloque de Bruxelles, publ. Ch. Perelman (Bruxelles: Bruylant 1970), pp. 46–47 [Travaux du Centre National de Recherche de Logique].

with concrete contents—close to the *Protokollsätze* of contemporary neo-positivism—serving as “normative atoms”: “If any one hire an ox, and put out its eye, he shall pay the owner one-half of its value. If any one hire an ox, and break off a horn [...], he shall pay one-fourth of its value”, and so on.⁶ Well, the answer will be a function of how we understand the concept of *Elementarsätze*. For the establishment of similarity—“[t]he simplest kind of proposition, an elementary proposition, asserts the existence of a state of affairs. [...] If all true elementary propositions are given, the result is a complete description of the world. The world is completely described by giving all elementary propositions, and adding which of them are true and which false.”⁷—does not offer any solution to the basic issue. For when we proceed gradually towards growing abstractness, we may logically reconstruct the development of normative regulation departing from that which is always concrete and particular in order to arrive at abstraction; we may also reveal the moment hierarchy comes into play, layering stratification and division into further meta-languages (as built upon everyday object-language by successive doctrines)—well, all this notwithstanding, the problem of the transformative jump⁸ from the object-language to the law’s meta-language (together with the enigma of how qualification can establish a normative connection between fact and norm) still remains unanswered in logic. This is so because the gradual differences in the law’s language cannot show more than differences of degree, i.e., quantity again. Therefore, no matter how far we may get along the way from the abstract—via the particular—towards the concrete through the breakdown of the generality of a regulation by disclosing its “concrete” and “elementary” components, what we shall find there will only be legal concepts again, in representation of the various levels of generality.

Or, considering the space freely available for motion in both directions between the concrete and the abstract, distinction between and separation of them can only be conceived of as related to one another. Consequently, legal concepts are by definition always considered “normative atoms” that, in function of their contexts, may equally be qualified as either “elemen-

⁶ *Code of Hammurabi* [c. 1870 b.C.] trans. L. W. King, ss. 247–248 <www.fordham.edu/halsall/ancient/hamcode.html#text>.

⁷ Ludwig Wittgenstein *Tractatus logico-philosophicus* (1921), paras. 4.21 & 4.26 <www.ibiblio.org/gutenberg/etext04/tloph10/txt>.

⁸ The expression is first used by Aleksander Peczenik & Jerzy Wróblewski ‘Fuzziness and Transformation: Towards Explaining Legal Reasoning’ *Theoria* 51 (1985) 1, pp. 24–44.

tary” or “abstract”, exposed to becoming further generalised or individualised, provided only that the goal-orientation of reasoning needs to do so.

2. The Internal Contradiction of Law

In every society and age, law has to face a dual challenge: it has to enforce its patterning definitions brought from the past according to its rules of standardisation, on the one hand, while it has to declare what solution it finds acceptable here and now in the name of the law, every factor (including the incidentalities of the case) considered, on the other.

It is in a figurative sense that we say: the law ‘binds’ us, ‘defines’ or ‘determines’ behaviours, and a decision ‘follows from’ it logically or otherwise. For the law we mean by this is only a reference to a past position. This is *tradition*, as the basis of patterning and the means of standardisation, which may be embodied by either custom or law. Custom itself is a state of the past, and the law, a text expressing results as drawn by a one-time formulation. Either of them can meet disputed situations of the present through being referred to by someone who, entitled to declare what the law is, makes his decision in the name of the law. Consequently, what we mean by law here is now enriched by three layers piled upon it. Firstly, our analysis places past states (custom) or texts (law) into a new medium of interpretation, reference and inference by *contextualising* what is given from the past for purposes of the present. Secondly, it *selects out* the rules that have to be followed in the course of comprehension, interpretation, reference and inference, by translating the observance of traditions into a practical set of procedural and technical know-how. Thirdly, it *makes* a decision as the law’s response is projected onto the given situation in the form of an actual message drawn from a past text.

This way, the law’s life is marked by facing pressures from two sides: developing its own processes and sets of operations in legal standardisation, which make legal decisions increasingly foreseeable and calculable as ever more controllably concluding from a previously defined set of formal criteria, on the one hand, while providing a hermeneutical medium for comprehension, interpretation, reference and inference, so the declaration of what the law is in any case can be presented as both assumable and desirable for the present, on the other.

Obviously, as interpreted in the present context, *past* and *present* cannot be contrasted to and made separable from each other. What they

mean here is only relational, therefore visual and figurative. For past is nothing but present, having been passed and lived through already. All we can learn from it is taken from what of the past has been preserved in and mediated by a memory—that is, by the memory of someone(s) belonging to the past and only to the extent it has been mentally extended to the present. Therefore, independent of whether we make our ideas engraved on a rock or printed in many copies, what may call to us from them cannot be but a sign, i.e., mere materiality, which can only build into the consciousness of the present by the very consciousness of the same present: as lived through by those actually living. Or, *hermeneutical understanding* is the realisation of the fact that no sign can be made alive other than as the imprint of the comprehension of the present upon the present.⁹

The differentiation of hermeneutical theories from non-hermeneutical ones is based upon responding to the question whether comprehension (interpretation) will necessarily imply *trans-comprehension* (*re-interpretation*) to a certain degree or not. In the affirmative, the epistemological response will necessarily amount to an ontological statement. For an inquiry into the sources of knowledge will in fact inquire into human consciousness: what it involves and what the signs we interpret are to mean.¹⁰ Hermeneutical theories themselves may then differ from one another as to their realisation by which factors and through which mechanisms they expect the observance of traditions to be kept controllable in processes and guaranteed in results. Yet they all will agree on the pivotal fact that only the present can select out and interpret, by cultivating both the intention of observance and the very culture of its practical implementation.

When talking about *legal mediation*, we actually mean the *culture of observance of traditions*. This is what constitutes the very framework within which the signs referring to and drawn from the past are processed—in a series of acts building up to a complex procedure, in which comprehension, interpretation, reference and conclu-

⁹ As “past” and “present” have only a metaphorical meaning, their relationality is not in the least changed in function whether the historical past and present or, say, only sequences in everyday talk are at stake.

¹⁰ So cognition too is described as an autopoietical process by the author. Cf. his *Lectures on the Paradigms of Legal Thinking* (Budapest: Akadémiai Kiadó 1999) vii + 279 pp. [Philosophiae Iuris].

sion are given a specific form. Thereby, answers of and for the p r e s e n t are formulated upon reference(s) to the p a s t .¹¹

According to legal deontology, we apply past patterns to present problems. However, in the light of legal ontology, we can do so exclusively through the present, with consciousness conditioned by the present (while also dedicated to trying to conform to the past), and so on.¹²

As is realised by now, only a figurative balance can be drawn amongst figuratively generated ideas. For instance, in a 'collision' of 'the past' and 'the present', the 'desirable' or 'acceptable' 'degree' of 'compromise' cannot be established as if an actual operation with things or discrete entities were at stake. One-sidedness, shift and disproportion in relation of 'past' and 'present' may still develop strikingly under limiting conditions or as a tendency that drastically changes practice in the long run, so as to become perceived as a dramatically new setting at once. In the short run, however, the issue is one of legal policy considerations, part of the reasoning itself, with the everyday job of weighing among competing (and mostly also casually conflicting) values. Ideologies of law-application are usually practice-oriented, which, by their relative over-emphases, may temporarily render law-appliers sensitive/insensitive in varying ways to some sides or components or considerations.

By the way, this is exactly why ideologies exist, namely, to exert, as an added factor artificially inserted into the process, influencing on—by interfering with—practical actions. Ideologies as kinds of a state of consciousness of actors put into play in practical action are always formulated as well as asserted with the background idea of influencing practice by channelling it. This is the very reason, too, why particular ideologies in the field of law can be more characteristic of given ages and cultures than others; this is the reason why particular professional deontologies as parts of the realm of ideologies can serve as a factor conditioning the undertaking of a definite legal policy orientation in a given legal culture, by its ability to define, among others, the relationship—by demarcating the respective paths and domains—of 'law-making' and 'law application' in a given way.

Over the past two centuries, there has been an especially turbulent metamorphosis with alternation of legal positivism and the various criticisms of

¹¹ For an early epoch-launching pioneering recognition, cf. Karl Georg Wurzel *Das juristische Denken* (Wien: M. Perles 1904) vi + 102 pp.

¹² For a monographic treatment, cf., by the author, *Theory of the Judicial Process* The Establishment of Facts (Budapest: Akadémiai Kiadó 1995) vii + 249 pp.

legal positivism on the European continent.¹³ That is, the small-minded exegetic normativism prevailing during the first two-thirds of the 19th century was altered by the free law movement by the first decades of the 20th century. This developed into a relaxed version of sociological (realist) pioneering between the two world wars, and then got a shape coloured by natural law in its new foundations (as a revitalising response to the challenge of the barbaric experience of the last world war), which, then, from the 1950s onwards, consolidated into a more balanced kind of legal positivism. Partly as a result of its own development but especially as intensified by Anglo-American influences in the 1960s, the so-called rigidity of rule-positivism started to be gradually given up (reversing one-time virtue to a drawback), in order to yield its place increasingly to a new positivism pondering upon principles by admittedly focussing more and more on consequences.¹⁴

Positivism, if not over as yet, is now set on looking for substantiation in practice and in values taken as able to orient human choices in situations of conflict.

¹³ As to a recent survey, cf., by the author, 'What is to Come after Legal Positivism? Debates Revolving around the Topic of »The Judicial Establishment of Facts«' in *Theorie des Rechts und der Gesellschaft* Festschrift für Werner Krawietz zum 70. Geburtstag, hrsg. Manuel Atienza, Enrico Pattaro, Martin Schulte, Boris Topornin & Dieter Wyduckel (Berlin: Duncker & Humblot 2003), pp. 657–676.

¹⁴ At the same time, it is replacing its theoretical foundation by describing the self-rationality of a culture that is labelled to have become discursive.

THE QUEST FOR FORMALISM IN LAW

Ideals of Systemicity and Axiomatisability between Utopianism and Heuristic Assertion*

I. Systemicity [88] 1. Form and Content [88] 1.1. In Arts and Law [88] 1.2. In German Philosophising [90] 2. Systemicity and Axiomatic Approach [95] 2.1. The Idea of System and the Law-codes [95] 2.2. Early Modern Times [97] 2.3. Recent Times [100] 2.4. Drawbacks in Philosophy [104] II. Axiomatism [105] 3. The Want of Axiomatisability [105] 3.1. From Deductivity to Axiomatisation [105] 3.2. Futile Approximations at the Most [106] 3.3. Lack of Deductivity in the Law's Deep Structure [112] 4. The Heuristic Value of an Ideal [113] 4.1. Cases of N/A [113] 4.2. Cases of Correlation [114] 5. Conclusion: Ideals and the Dialectics of Substantivity [122]

Formalism is a recurrent topic in debates on law without, however, its components being analysed to an adequate depth. In the English-speaking legal world, it takes precedence as the duality or antagonism of form and substance,¹ the fact notwithstanding that its origins in philosophy once were

* First published as 'A kódex mint rendszer (A kódex rendszer-jellege és rendszerkénti felfogásának lehetetlensége)' [The code as a system (The systemic character of the code and the impossibility of its conception as a system)] *Állam- és jogtudomány* XVI (1973) 2, pp. 268–299, abbreviated as 'Heuristic Value of the Axiomatic Model in Law' in *Auf dem Weg zur Idee der Gerechtigkeit* Gedenkschrift für Ilmar Tammelo, hrsg. Raimund Jakob, Lothar Philipps, Erich Schweighofer & Csaba Varga (Münster, etc.: Lit Verlag 2009), pp. 127–134 and *in extenso* published under the present title in *Acta Juridica Hungarica* 50 (2009) 1, pp. 1–30 & <<http://www.akademiai.com/content/k7264206g254078j/>>.

¹ For some classics, see Duncan Kennedy 'Form and Substance in Private Law Adjudication' *Harvard Law Review* 89 (1976) 8, pp. 1685–1778; P. S. Atiyah *Form and Substance in Anglo-American Law* A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions (Oxford: Clarendon Press & New York: Oxford University Press 1987) xx + 437 pp.; Robert S. Summers *The Jurisprudence of Law's Form and Substance* (Aldershot & Brookfield: Ashgate 2000) xii + 309 pp. [Collected Essays in Law]. For some recent papers, cf. also Edward J. Epstein 'Codification of Civil Law in the People's Republic of China: Form and Substance in the Reception of Concepts and Elements of Western Private Law' *University of British Columbia Law Review* 32 (1998) 1, pp. 153–198; Leo Katz 'Form and Substance in Law and Morality' *University of Chicago Law Review* 66 (1999) 3, pp. 566–596; Allen D. Madison 'Tension between Textualism and Substance-over-Form Doctrines in Tax Law' *Santa Clara Law Review* 43 (2002–2003) 3, pp. 699–750; C. Stephen Bigler & Blake Rohrbacher 'Form or Substance: The Past, Present, and Future of the Doctrine of Independent Legal Significance' *Business Law* 63 (2007–2008) 1, pp. 1–24.

formulated—as they continue being termed in European continental culture—in the dichotomy of form and content.

I. SYSTEMICITY

1. Form and Content

1.1. *In Arts and Law*

Facing the challenge of how to define literature and, above all, poetry as its subject, the American New Criticism came to recognise the essential moment in the phenomenal form of human objectifications, with decisive significance granted to the arrangement of contentual elements in some selected way. With the fresh and almost neophyte impulse of the movement, AUSTIN WARREN answered the underlying issue by claiming that poetry is *r e d u c i b l e t o t h e m e t h o d s i t u s e s*.² Such a reply by one of today's classical authors (thanks to the *Theory of Literature* he co-authored with RENÉ WELLEK³) is rather thought-provoking on account of its conciseness. What is even more striking is its one-sidedness, augmented by its express simplicity. True, this is barely more simplified than the one-sidedness in the opposite sense of the old formula, held universally valid in abstraction from any real connection, according to which content and form are reflexively co-existent. For the New Criticism opposed in fact the absolutism of contents, claiming that form can also become the generator of contents, at least in some specific domains of human artificiality with arts and law included, among others.

With human objectifications, formal moments may carry various features and serve a variety of functions. As is well known, HEGEL once differentiated as *e x t e r n a l* forms those components that can be utterly incidental to *i n t e r n a l* ones, while also indifferent to the definition of the

² Austin Warren 'Literary Criticism' in Norman Foerster (et al.) *Literary Scholarship Its Aim and Methods* (Chapel Hill: The University of North Carolina Press 1941) ix + 269 pp., in particular at p. 143. Cf. also Péter Rákos *Tények és kérdőjelek Tűnődés az irodalmon* [Facts and question marks: contemplations on literature] (Bratislava: Madách 1971) 310 pp. on p. 17.

³ Austin Warren & René Wellek *Theory of Literature* (New York: Harcourt & Brace 1949) x + 403 pp. {3rd rev. ed. (San Diego: Harcourt Brace Jovanovich 1977) 374 pp.}

subject. "In a book, for instance, it certainly has no bearing upon the content, whether it be written or printed, bound in paper or in leather."⁴

In everyday life, formal moments often play the role of serving as a criterion for distinction. Properly speaking, they may, by affording the *differentia specifica*, provide an outer sign identifying the subject and, thereby, lending it a proper denomination, certainly without playing any decisive role in shaping its substantial properties. In the case of some metals, for example, defining specific gravity by indicating the proportion of weight to volume offers an easy means of differentiation. Moreover, a complete taxonomy can be achieved this way, without the criterion applied being able to furnish any information about the sorts of materials classified, other than serving as a merely pragmatic order-helping classification in practice. In such cases, the distinctive role played by formal features, less significant in themselves, may perhaps be primarily explained by the particular relation of object to subject in everyday life, and particularly by the outstanding importance of the object's given features to the very subject.

Formal features may promote certainty of recognition and designation anyway. In everyday practice, by mentally anticipating contentual definitions issuing from a generalised experience we can select out any object classified according to and identified by its particular formal appearance. However, in case of law or literary works, mere phenomenal forms are not simply external(ised) properties or characteristics of the object in question, attached to it constantly or temporarily in a historically sanctioned manner. Anything appearing as a legal form (organised at a given hierarchical level through given procedures and methods) is only an external expression of deeper social relations and interests, that is, of material contents. Nevertheless, this very form represents and also embodies the contents expressed; moreover, by becoming an alienatingly reified entity, it may even master them.⁵ And almost the same can be said of literature, too.

⁴ By Georg Wilhelm Friedrich Hegel, *Logic* trans. William Wallace [1873] (Oxford: Clarendon Press 1975) in <http://www.kern-ep.de/Internet/Hegels_Logik/appearan.htm> {& <http://www.marxists.org/reference/archive/hegel/works/sl/appear.htm#SL133_1>} and *Enzyklopädie der philosophischen Wissenschaften im Grundriss* [1817], § 133n in <<http://pedagogie.actoulouse.fr/philosophie/textes/wl131.htm>>. [„Betrachten wir z.B. ein Buch, so ist es für den Inhalt desselben allerdings gleichgültig, ob dasselbe geschrieben oder gedruckt, ob es in Papier oder in Leder eingebunden ist.”]

⁵ Cf., by the author, ‘‘Thing’’ and Reification in Law’ in his *The Place of Law in Lukács’ World Concept* (Budapest: Akadémiai Kiadó 1985, ²1998), Appendix, pp. 160–184.

1.2. In German Philosophising

Projected onto human objectivations, we may thus safely define the form as being—rather than “a kind of envelope which »contains« the »content«”⁶—an organic medium of contents, without which the latter could hardly be more than dead abstraction, facing the risk of switching repeatedly into something else. This is by no means a new realisation. HEGEL long ago formulated the *d i a l e c t i c i d e n t i t y* of contents and form in a radical manner, explicating that “the content, as such, is what it is only because the matured form is included in it”. “So it comes about that the form is *C o n t e n t*: and in its phase is the *L a w o f t h e P h e n o m e n o n*.”⁷ Following this course of development, the founders of MARXism were not content either with merely establishing the mutual transubstantiation of contents and forms into one another but also found that an overwhelming role was being played by the former. However, not even within that tradition must contentual priority amount to having nihilistic effect on the form. For, according to LUKÁCS,

“the specific examination of the form is by no means something unnecessary and even less a problem the exploration of which is [...] opposed to the method of the dialectical and historical materialism.”⁸

Returning to the starting point, the original objective of the New Criticism was to lead the formal organisation of contents back to the role it is due, which is to serve as those contents that cannot indeed be but the outcome of such an organisation. By such a realisation, the “*h e r e s y o f p a - r a p h r a s e*” becomes one of the central concerns of the New Ameri-

⁶ Cleanth Brooks *The Well Wrought Urn* Studies in the Structure of Poetry (New York: Harcourt & Brace / Reynal & Hitchcock 1947) xi + 270 pp. at p. 192, in which case “the »form« [is] conceived as a kind of container, a sort of beautified envelope” (p. 226), albeit (as continued on p. 197) “form and content, or content and medium, are inseparable.”

⁷ Hegel [note 5], § 133n and 133 in <http://www.kern-ep.de/Internet/Hegels_Logik/appearan.htm> & <<http://www.marxistst.org/reference/archive/hegel/index.htm> [„der Inhalt als solcher das, was er ist, nur dadurch ist, daß er die ausgebildete Form in sich enthält.”] and <<http://pedagogie.actoulouse.fr/philosophie/textes/w131.htm>> [„So ist die Form *Inhalt* und nach ihrer entwickelten Bestimmtheit das *Gesetz* der Erscheinung.”].

⁸ Georg Lukács *Über die Besonderheit als Kategorie der Ästhetik* (Berlin & Weimar: Aufbau-Verlag 1985) 346 pp. at p. 156. [„so ist eine gesonderte Untersuchung der Form doch keineswegs etwas Müßiges und insbesondere kein Problem, dessen Erforschung [...] der Methode der dialektischen und historischen Materialismus widerstreben müßte.”]

can Criticism. For, obviously, the production of some literary “contents” through non-literary “formless” means would precisely deprive the outcome of its specific quality. Due to its normatively posited character, the legal form, too, is strictly inseparable from all its underlying contents. That is, no contents can be asserted as specifically legal unless organised in/into a legal form. From this perspective, it is a matter of indifference how we appreciate the apparent antagonism between the law’s positivistic and sociological approaches in describing what role as container we ascribe to legal form and what criteria we set for it. Irrespective of whether the legal form is generated as a text through previously defined procedures or as selected out from the actual practice (jurisprudence) of judicial organs or even if—ideally—it encounters both options to reach their synthesis, all show the emphatic formalism inherent in anything coming into being as “distinctively legal”.⁹ Or, the “paraphrase” of generating alleged legal contents through extra-legal means could only result in loss of the law’s specific quality: failure in form ending in evaporation of substance, i.e., juridicity.

Consequently, what is at stake here is not simply “dialectic” identity. In addition, it also involves a certain condensation of what makes its overall substance. In summary of his studies in HEGEL, LENIN could only reassert that “Form is essential. Essence is formed. In one way or another it is also in dependence on Essence”.¹⁰

The form’s essentiality can vary in diverse types of human—societal—objectivation. For example, relating to the aesthetic quality of a work of art it has been found that

“giving a form is the genuinely decisive principle while the aesthetical processing of contents is only preliminary to it, meaning but little artistically as

⁹ For the duality of how to understand legal form (either as the law’s internal criterion or external description) and the need and availability of a synthesis, see, by the author, ‘Quelques questions méthodologiques de la formation des concepts en sciences juridiques’ in *Archives de Philosophie du Droit* XVIII (Paris: Sirey 1973), pp. 205–241. The term ‘distinctively legal’ is used by Philip Selznick ‘The Sociology of Law’ in *International Encyclopedia of the Social Sciences* 9, ed. David L. Sills (New York, etc.: MacMillan and The Free Press 1968), pp. 51 et seq.

¹⁰ Vladimir Uljanov Lenin’s Annotations on Book II (Essence) of Hegel’s *Science of Logic* in his Abkjcjacrbt ntnhfls [Filosofskie tetradi / Philosophical notebooks] in his *Collected Works* 38 (Moscow: Foreign Languages Publishing House 1960–1967), pp. 129–164 in <<http://www.marxists.org/archive/lenin/works/1914/cons-logic/ch02.htm>>. [„Die Form ist wesentlich. Das Wesen ist formiert. So oder so in Abhängigkeit auch vom Wesen”.]

stopping there could result—instead of some poorer artistic performance—nothing in the least in an aesthetical perspective.”

Although “this lack of independence [...] does not change the priority of contents”, all this is suitable to show “the form’s decisive, independent, finishing function on the work.”¹¹ The basic relationship between contents and form is not different in law either. For processing contents to be objectivated as a law, prior to giving it its due form, is theoretically nothing other than

“preparatory work [...] which—as by itself it does not produce anything legally significant, valuable or valid—gains a normative character and strength, i.e., legal normativity, exactly in this particular legal formulation”,

as no kind of “legal-normative quality and significance” can actually arise preceding “the actual form-giving phase of the law-making process”.¹²

Or, this emphatic significance attributed to formalism in law may not have been emerged by chance in history, as

“all the needs of civil society—no matter which class happens to be the ruling one—must pass through the will of the state in order to secure general validity in the form of laws.”¹³

As proved by the example of bourgeois society, this significance is rooted in the nature of law, that is, in the final account, in the very nature and underlying relations of a society within which the objectification of fundamental relationships and needs has become the primary condition of survival. As it is expressed in laws, the human will is socially conditioned in view of both

¹¹ Lukács *Über die Besonderheit...* [note 9], pp. 238 and 240. [„die Formung das eigentliche entscheidende Prinzip ist, die ästhetische Bearbeitung des Inhalts eine bloße Vorarbeit, die künstlerisch an sich noch wenig bedeutet, da ein Stehenbeliben bei ihr nicht eine schwächere Kunstleistung, sondern ästhetisch angesehen, überhaupt nichts zustande bringt.“ „Dieser Mangel an Selbständigkeit ändert {...} nichts an der Priorität des Inhalts“ „die ausschlaggebende, selbständig vollendende Funktion der Form am Werk.”]

¹² Vilmos Peschka *Jogforrás és jogalkotás* [Source of law and law-making] (Budapest: Akadémiai Kiadó 1965) 497 pp., on pp. 354, 360 and 357.

¹³ Frederick Engels *Ludwig Feuerbach and the End of Classical German Philosophy* [Ludwig Feuerbach und der Ausgang der klassischen deutschen Philosophie] in <<http://www.marxists.org/archive/marx/works/1886/ludwigfeurbach/ch04.htm>>. [„müssen auch alle Bedürfnisse der bürgerlichen Gesellschaft — gleichviel, welche Klasse grade herrscht — durch den Staatswillen hindurchgehn, um allgemeine Geltung in Form von Gesetzen zu erhalten.”]

their contents and form. “The individuals who rule in these conditions [...] have to give their will [...] a universal expression as the will of the state, a *law*”, because

“[j]ust as the weight of their bodies does not depend on their idealistic will or on their arbitrary decision, so also the fact that they enforce their own will in the form of law, and at the same time make it independent of the personal arbitrariness of each individual among them, does not depend on their idealistic will.”¹⁴

Or, the increased significance given to the actual form of expression also involves the fact that the shaping of substance—not in any but in one given, and exclusively in that given, way—is no longer an external completion but has itself been transformed into a substantial property, taking a share in the very substance of the subject, which will enter the scene as the given organisation of contents, moreover, as the substantive moment of the organised contents.

In addition to the need of the ruling class to express its will in the form of laws, the same authors also took a stand in their *German Ideology* on the inherent consequences and side-effects all of the above have at the level of both social and individual consciousness. For, in the case of such objectified expressions, “their relations assume an independent existence over against them” as “the forces of their own life become superior to them” and, embodied by concepts, they offer a broad scope to the “illusion” that may conceal or cover up their original determination and contents; for: “Idea of law. Idea of state. The matter is turned upside-down in ordinary consciousness.”¹⁵ However, this upside-down turn is far more than a mere appearance or a false image in consciousness that may appear as a specific distortion “in ordinary consciousness.” In the case of law as a formalised objectivation through institutionalisation, it is “the matter” itself that is turned upside-down. Thus, as a result of objectification, a new quality may emerge that sublates the old one (negating while retaining it), with the perspective of detaching itself from it on principle. To be sure, the formal side of legal objectivation is granted a stressed and essentialised significance for just the reason that once objectification is perfected, it will have gained its own existence independent of its genesis, that is, in or-

¹⁴ <<http://www.marxists.org/archive/mark/works/1845/german-ideology/ch03j.htm>>.

¹⁵ <<http://www.marxists.org/archive/mark/works/1845/german-ideology/ch01jc.htm>>.

der that it can be applied—even if turned against its original determination, while preventing any criticism that may be against its contents—as a means of social regulation, a pattern of behaviour with indisputable validity.

Accordingly, the “e n c h a n t m e n t” of social relations through their transformation into legal form can also be recognised in the imperfection of their translation into abstract rules and in the latter’s deliberately simplifying tendency.¹⁶ “Enchantment” becomes complete when social relations transcribed into legal contents have already lost their original—primary—essentiality, sublated into a new quality.

HEGEL encountered the specifically emphatic role of form where an a p p r o p r i a t e form was needed, that is, with works of art, where “[s]o far is this right form from being unaffected by the content that it is rather the content itself.”¹⁷ Or, there is a need for an appropriate form in law, too, at least partially and in a restricted sense. This is the very problem of paraphrase. But certain elements of difference also have to be highlighted. That is, the form appropriate in a e s t h e t i c a l q u a l i t y is the individual form of a unique work of art, a concrete totality with a set of formative elements having organised the contents, which may have generated aesthetical quality in its uniqueness. By contrast, the form appropriate to legal quality is less unique and concrete. In other words, to reach an aesthetical quality, the form has to be regenerated in a concrete and individual manner; for if anyone only “makes the aesthetical *a priori* of the acquisition and formation of reality”,¹⁸ this will be incapable of creating any genuinely aesthetical quality. That is to say, the field of aesthetical quality is not formalised. There are no standardised forms there. As opposed to this, granting a specifically l e g a l f o r m is the normative *a priori* of the formation. It is indeed the schematic form or blanket formula that makes any formation transubstantiated into a legal quality as distinguished from anything else.

¹⁶ For an expressive description, see Imre Szabó *Les fondements de la théorie du droit* (Budapest: Akadémiai Kiadó 1973) 340 pp.

¹⁷ <http://www.kern-ep./Internet/Hegels_Logik/appearan.htm>.

¹⁸ Lukács *Über die Besonderheit...* [note 9], p. 159.

2. Systemicity and Axiomatic Approach

2.1. The Idea of System and the Law-codes

It is the law-code's *systemicity* as an externally distinctive mark that characterises its technological and instrumental novelty both comprehensively and substantively. Systemicity as a formal criterion forms a bridge between the historical proto-forms and the modern implementations of the ideal of codification. By breaking open the envelope of conceptuality and revealing its individual and particular (historical) layers (as in HENRIK IBSEN's drama *Peer Gynt*), systemicity will remain the very core of any conceptuality as its innermost domain. Or, this is the *differentia specifica* of one of the law's paths and manners of becoming objectified, its *sine qua non* property.¹⁹

That is, systemicity as a technical term is in a position rather to suggest than to specify given contents. For systems can be constructed on different levels with differing structural forms and complexity, with degrees of materialisation varied in "maturity" and "perfection". For the time being, the analysis of natural dynamic systems not having been extended as a conventionalised methodology onto linguistic and intellectual systems, general systems theory cannot yet offer a comprehensive definition for it. Nevertheless, its notion is suitable to reflect the heterogeneity of systemic contents. According to a minimum concept, "[a] *system* is a set of units with relationships among them." Or, "[a] *system* is a set of objects together with relationships between the objects and between their attributes."²⁰ According

¹⁹ Cf., by the author, 'Codification at the Threshold of the Third Millennium' *Acta Juridica Hungarica* 47 (2006) 2, pp. 89–117 {& <<http://www.akademiai.com/content/cv56191505t7k36q/fulltext.pdf>> and 'Codification on the Threshold of the Third Millennium' in *Legal and Political Aspects of the Contemporary World* ed. Mamoru Sadakata (Nagoya: Center for Asian Legal Exchange, Graduate School, Nagoya University 2007), pp. 189–214}.

²⁰ Ludwig von Bertalanffy 'General System Theory' and Arthur Donald Hall & Robert E. Fagen 'Definition of System' in *General System Yearbook* I (1956), pp. 1–10 and 18–28 {& in <http://isss.org/projects/general_system_yearbook>}. Cf. also A. И. УЭМОВ [A. I. Uemov] 'Системы и системные исследования' [Sistemy i sistemnye issledovannia / Systems and systemic research] in *Проблемы методологии системного исследования* [Problemy metodologii sistemnogo issledovania / Problems of the methodology of systemic research] (Москва: Мысль [Moscow: Mysl] 1970), p. 68. By adding "purposeful formation" as a common generic concept, a similar definition was in fact proposed by В. Н. Саловский [V. N. Sadovskij] in his 'К вопросу о методологических принципах исследования предметов, представляющих собой системы' [On the question of the methodological principles of the investigation of subjects presupposed by their system] in *Problemy metodologii i logiki nauk* [Problems of the methodology and the logic of science] (Tomsk 1962) 73 pp.

to a more sensitive and stricter definition that covers linguistic-theoretical systems as well,

„[a] system is: (1) something consisting of a set (finite or infinite) of entities: (2) among which a set of relations is specified, so that (3) deductions are possible from some relations to other or from the relations among the entities to the behavior or the history of the system.“²¹

There is a significant difference in degree between the two definitions above, although both represent dynamic systems that can be found in both natural and social realities. Considering the depth of internal coherence, interdependence and self-closure, their difference is by no means in degree but one resulting in a new quality of those conceptual systems that, due to their logically exhaustive deductivity, are indeed axiomatic systems.

For there is a *hierarchy* among systems. The minimum is perhaps the state in which some loosely co-related aggregation of objects is scarcely interlaced by affinities and the centripetal forces cementing the system together are hardly capable of anything more than neutralising centrifugal forces. The maximum may be the state in which each and every element of a system is tied to all the others so closely that, owing to their multiple mutual intertwinings, each of them will by its very existence strengthen the others, while withdrawing any element(s) out of—or, properly speaking, making any change in—the system would necessarily collapse the entire system. Thus, the course of *systemic development* ranges from some rudimentary stage to the state of *completed axiomatisation*. It is not by chance that *EUCLID'S Elements* has long served to embody the ideal of law-codification in modern times. Within the scope of the classical model,

“[t]he terms belonging to the theory are never introduced into it without being previously defined; the theses are developed in the theory only after having been previously proved, except for a small number of them which are laid down as principles in the beginning: this way the proof cannot be extended to infinity but has to be founded on some primary theses which have been selected excluding any doubt regarding their conceivability in a healthy spirit. And although anything proposed is empirically certainly true, no reference is made to experience in justification: the geometer pursues only a demonstrative route,

²¹ Anatol Rapoport ‘General Systems Theory’ in *International Encyclopedia of the Social Sciences* 15, ed. David L. Sills (New York, etc.: The Macmillan Co. & The Free Press 1968), pp. 452–453.

founding his proofs exclusively onto what has been previously proposed, while taking into consideration nothing but the laws of logic. This way, any theorem is connected with the chain of necessity to such theses from which it has been deduced as a consequence, until a strictly enclosed network is gradually reached, in which all theses are directly or indirectly interconnected to be eventually concluded in a system, of which not any single part could be withdrawn or modified without the whole being destroyed.”²²

In law, as early as in proto-forms, *c o d i f i c a t i o n* aimed at written recording of the law through its systematic elaboration. The quest for a systematic restatement of laws in one textual body emerged historically as functionally bound, and its social objectives always thematised the perspicuity and conclusion of regulation by its self-closing. Later on, hierarchical structures were built in, using a pyramidal construction. The lawyer, the jurispudent and the legal philosopher were mostly led by other motives than a moment of inertia, an instinct towards self-development or pragmatic consideration of how to fulfil the ideal—or fall in the trap—of axiomatism. Throughout history, the conception formed on the availability of axiomatic (re)construction through law codification has been closely connected with the idea of (re)structuring legal and social reality.

2.2. Early Modern Times

Although codification was matured into a classical type in the 19th century, during the 17th century ambitions as to the law’s *a x i o m a t i c (r e) c o n s t r u c t i o n* were enhanced. Through the discoveries of KEPLER, GALILEI, HARVEY, GASSENDI, HUYGENS, NEWTON and others, this was the century to attain a decisive victory of a natural-scientific world-view

²² Robert Blanché *L’Axiomatique* [1955] 5^e éd. (Paris: Presses Universitaires de France 1970) 108 pp. [Quadrige – Initiation philosophique 17], pp. 9–10. [„Les termes propres à la théorie n’y sont jamais introduits sans être démontrées, à l’exception d’un petit nombre d’entre elles qui sont énoncées d’abord à titre de principes: la démonstration ne peut en effet remonter à l’infini et doit bien reposer sur quelques propositions premières, main on a pris soin de les choisir telles qu’aucun doute ne subsiste à leur égard dans un esprit sain. Bien que tout ce qu’on affirme soit empiriquement vrai, l’expérience n’est pas invoquée comme justification: le géomètre ne procède que par voie démonstrative, il ne fonde ses preuves que sur ce qui a été antérieurement établi, en se conformant aux seules lois de la logique. Chaque théorème se trouve ainsi relié, par un rapport nécessaire, aux propositions dont il se déduit comme conséquence, de sorte que, de proche en proche, se constitue un réseau serré où, directement ou indirectement, toutes les propositions communiquent entre elles. L’ensemble forme un système dont on ne pourrait distraire ou modifier une partie sans compromettre le tout.”]

over mediaeval scholastic thought, proclaiming the triumph of human intellect in victorious self-assertion of the middle classes at a time preceding their political success through revolution, and granting autonomy recognition to the sciences during the *grand siècle*. The sciences themselves were unified according to mathematics' pattern, in a way that prompted GALILEO GALILEI to declare that the language of nature is set by the symbols of mathematics. In one of the milestones of human intellectual history, the *Discours de la méthode* (1637), RENÉ DESCARTES formulated his basic methodological tenets as follows:

"The long chains of simple and easy reasonings by means of which geometers are accustomed to reach the conclusions of their most difficult demonstrations, had led me to imagine that all things, to the knowledge of which man is competent, are mutually connected in the same way and that there is nothing so far removed from us as to be beyond our reach, or so hidden that we cannot discover it".²³

Far from content with establishing mere structural similarity, DESCARTES applied his geometrical notion to build up mentally the philosophical-scientific universe on solid foundations through irrefutable principles, advancing step by step from the simple towards the complex. And just in the way as the stance of *cogito ergo sum* could become the cornerstone of CARTESIAN rationalism, some maxims taken as universally valid could also substantiate the unfolding of law, while in political philosophy, based on the assumption of social contract, hypothesising some natural state (by presuming isolated human beings without bonds of institutionally established trust amongst them) had to serve as a starting point for reasoning.

Of course, CARTESIAN rationalism was not launched in jurisprudence in a form achieved and completed like Pallas Athene, by one stroke and fully armed. DESCARTES himself, anticipating later developments, only accomplished the summation of progressive methodological tendencies already inherent in his age. For, starting by the 15th century, the progression of natural sciences instigated jurists to lay the foundations of a new jurisprudence that could prove to be as scientific, reliable and certain as the new science of NEWTON and COPERNICUS. Accordingly,

²³ René Descartes *Discourse on the Method of Rightly Conducting the Reason, and Seeking Truth in the Sciences* [Discours de la méthode pour bien la raison, et chercher la vérité dans les sciences, 1637] trans. John Veitch (1901) in <<http://bdsweb.tripod.com/en/106.htm>>.

“many theorists wanted to ensure that choices among competing rights [were] constrained by clear and unambiguous principles, so that judicial judgment could be separated from the uncertainties of political rhetoric and metaphysical theory. The lawyers of the Enlightenment were, in a word, looking for a legal science in which certainty was guaranteed through method. Ever since the Enlightenment this implied that legal story [...] would have to be transformed from a religious fable into a scientific dissertation.”²⁴

Back in the early 17th century, JOHANNES ALTHUSIUS investigated law in his *Dicaeologicae* (1617) as a part of natural reality, undertaking to describe in a scholarly way this specific part of reality. At the same time, he framed his notions—following the method of PIERRE DE LA RAMÉE, i.e., the RAMIST logic—into a mathematical order. Thus, PETRUS RAMUS (in Latin) followed the pattern of his exposition,²⁵ who himself stood on the borderline between the Middle Ages and modern times.²⁶ Few years later, in 1625, HUGO GROTIUS erected in his *De jure belli ac pacis* a system of law, deduced with a certainty that could only compare to the conclusions reached in mathematics. For doubt no longer existed for him. His law is quite autonomous a creature, as “natural law has become the categorical imperative of creation”;²⁷ and the proud words of its *Prolegomena* also reflect this unwavering confidence, freed from church theology and moral philosophy alike, only restricted by nature and common sense:

“What we have been saying would have a degree of validity even if we should concede that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of men are of no concern to Him.”²⁸

This is how the axiomatic understanding of law and codification gradually took on a pure, theoretically sophisticated form; this is the way in which the

²⁴ A. J. van der Walt ‘Marginal Notes on Powerful Legends: Critical Perspectives on Property Theory’ *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 58 (1995), pp. 396–420 at p. 402.

²⁵ E.g. Derek van der Merwe ‘Ramus, Mental Habits and Legal Science’ in *Essays on the History of Law* ed. D. P. Visser (Cape Town: Juta 1989), pp. 32 et seq.

²⁶ Cf. Michel Villey *La formation de la pensée juridique moderne* (Paris: Les Editions Montchrestien 1968) 715 pp. on pp. 588–589.

²⁷ Albert Brimo *Les grands courants de la philosophie du droit de l’État* 2^e éd. (Paris: Pedone 1968) 436 pp. [Philosophie comparée du droit et de l’État] at p. 86.

²⁸ Hugo Grotius *De jure belli ac pacis* [1625], *Prolegomena*, sect. II, in <<http://www.lonang.com/exlibris/grotius>>. The explication continues by stating that “The very opposite of this view has been implanted in us partly by reason, partly by unbroken tradition, and confirmed by many proofs as well as by miracles attested by all ages.”

great rationalising attempt by modern jurisprudence to reformulate the law within a geometrically inspired system of law-codes was finished and consummated.

That is, following the transition by ALTHUSIUS and the breakthrough by GROTIUS, quite a few jurists ventured the impossible by attempting to implement axiomatic understanding. The oeuvres of WEIGEL, FELDEN, PUFENDORF and others are methodical schools of deductive system building. GEORG WILHELM LEIBNIZ was one of them, responding to the historical challenge of axiomatism with the entire passion of a lifetime's overall oeuvre, almost identifying his personal vocation on Earth with the underlying issue in such a way as to exert an impact upon us with his failures as well, up to the present day.²⁹

2.3. Recent Times

True, the age of DESCARTES and LEIBNIZ passed once and for all, and CARTESIAN rationalism lost its vitality as a philosophical system of its own, surviving—like other great heritages of human knowledge—no longer in the form of its individuality but as integrated into our culture of Western knowledge. Nevertheless, the attempt at axiomatisation was not just a historical adventure but a fundamental logico-methodological challenge to be faced by varying ages under differing conditions and scholarly predispositions. To be sure, it was not LEIBNIZ as the first or SPINOZA as the last who ventured to transform the language of philosophy into mathematics. One of the roughest, strikingly distorted versions of the aprioristic method as a “sublime nonsense, the most characteristic mass product of Germany's intellectual industry” practically flooded 19th century Germany, as to which, in preparation for launching the coming new epoch of positivism and empirism in scholarship, ENGELS, too, entered into passionate polemics.³⁰

The revival (or renaissance) of axiomatism was accompanied by such and similar self-destructively sterile extremities, characterised by the brutal fact and inherent irony that, after all,

²⁹ Cf., by the author, ‘Leibniz und die Frage der rechtlichen Systembildung’ in *Materialismus und Idealismus im Rechtsdenken* Geschichte und Gegenwart, hrsg. Karl A. Mollnau (Stuttgart: Franz Steiner Verlag Wiesbaden 1987), pp. 114–127 [Archiv für Rechts- und Sozialphilosophie, Beiheft 31].

³⁰ Frederick Engels *Herr Eugen Dühring's Revolution in Science* Anti-Dühring [Herrn Eugen Dührings Umwälzung der Wissenschaft] (Moscow: Foreign Languages Publishing House 1947), quote on p. 13.

“it yields nothing except a further image of itself. It is an elaborate tautology. Unlike numbers, words do not contain within themselves functional operations. Added or divided, they give only other words or approximations of their own meaning.”³¹

Or, the re-emergence of axiomatism, including a renewed attempt at breaking down the law into an axiomatically erected system, is encountered where and when a comprehensive methodological foundation, like the one once provided by CARTESIAN rationalism in the 17th century, is made available. Such seems to be the case even in our mid-20th-to-early-21st century, when mathematical logic and cybernetics and legal informatics and e-government, as instruments of the ongoing second-to-third industrial revolution, are to recognise one of their forefathers in LEIBNIZ; when MARX is referred to as one of the forerunners of mathematisation in social sciences;³² when reasonable, even downright desirable, attempts are made both to computerise legal information and implement the cybernetic approach to law and its codification—at the risk of absolutisation, there is no need to add.³³

In itself, the claim of the law’s logical processing by no means necessarily leads to axiomatic system building. Nevertheless, the question of whether or not the law’s formal reconstruction will necessarily imply axiomatic metho-

³¹ A passage continued by an idea dear to SPINOZA: “Language is seen no longer as a road to demonstrable truth, but as a spiral or gallery of mirrors bringing the intellect back to its point of departure.” Georg Steiner *Language and Silence* Essays on Language, Literature, and the Inhuman (New Haven & London: Yale University Press 1998) xiv + 426 pp. at p. 20.

³² See, e.g., *Воспоминания о Марксе и Энгельсе* [Vospominaniya o Markse i Engelse: Recollections on Marx and Engels] (Москва: Госполитиздат [Moscow: Gospolitizdat] 1956), p. 6, quoted by В. П. Казимирчук [V. P. Kazimirchuk] *Право и методы к его изучения* [Pravo i metody ego izucheniya: Law and the methods of its research] (Москва: Юридическая литература [Moscow: Iuridicheskaja Literatura] 1965), p. 166.

³³ Cf., only from the publications of the Viennese *Internationale Rechtsinformatische Seminare* at Salzburg, *Zwischen Rechtstheorie und e-Gouvernement* gewidmet Friedrich Lachmayer, hrsg. Erich Schweighofer (Wien: Austria Verlag 2003) 610 pp. [Schriftenreihe Rechtsinformatik 7] and *10 Jahre IRIS* hrsg. Erich Schweighofer (Stuttgart: Boorberg 2007) 503 pp.; as well as those titles including contributions by the present author as well, *Informationstechnik in der juristischen Realität* Aktuelle Fragen zur Rechtsinformatik 2004, hrsg. Erich Schweighofer, Doris Liebwald, Günther Kreuzbauer & Thomas Menzel (Wien: Verlag Österreich 2004) 490 pp. [Schriftenreihe Rechtsinformatik 9], *Effizienz von e-Lösungen in Staat und Gesellschaft* Aktuelle Fragen der Rechtsinformatik, hrsg. Erich Schweighofer (Stuttgart: Boorberg 2005) 662 pp. and *Auf dem Weg zur Idee der Gerechtigkeit* Gedenkschrift für Ilmar Tammelo, hrsg. Raimund Jakob, Lothar Phillips, Erich Schweighofer & Csaba Varga (Münster, etc.: Lit Verlag 2009) 321 pp.

dology arises at times, with the ensuing tendency to describe (or, rather, transcribe) legal operations in schemes of formal logic. The trend aiming at a complete and exhaustive formal logical reconstruction of the law's operations (usually referred to as the formalist, as opposed to the anti-formalist, direction)³⁴ does not exclude axiomatic reconstruction from the outset.³⁵ The very existence of a literary tradition of vague ideas and uncertain notions about the possibility of axiomatising the law is shown, for instance, by JOSEF ESSER who, while far from adopting formalism personally,³⁶ used the dichotomy of "axiomatically oriented" and "problem-oriented" throughout his work.³⁷ He conceived these opposites as synonymous to the "closed system" presupposed by codification, on the one hand, and the "open system" operating with case law, on the other.³⁸ This same approach is solidified by JULIUS STONE's definite assertion, according to which

"[i]f a legal order were designed to contain within itself a sufficiently comprehensive set of legal propositions precise and stable enough in meaning so that only one answer could be deduced from them for every problem presented for legal solution, those who operated with it would need to use only formal logic. [...] Such a legal order would be an axiomatic system—an axiomatics—like geometry or algebra."³⁹

To be sure, a logical conclusion by no means presupposes an axiomatic structure, albeit by axiomatic character STONE exclusively meant the logically operated nature of premises. His remark adds a somewhat absolutistic form to his thesis, claiming that

³⁴ For the basic controversy between anti-formalism and formalism, see the plenary session papers presented at the World Congress of the International Association for Philosophy of Law and Social Philosophy in Brussels in 1971, most eminently by Chaïm Perelman 'Le raisonnement juridique', pp. 1–15 and Georges Kalinowski 'Le raisonnement juridique', pp. 17–42, both in *Die Juristische Argumentation* (Wiesbaden: Steiner 1972) [Archiv für Rechts- und Sozialphilosophie, Beiheft 7].

³⁵ E.g., Georges Kalinowski *Introduction à la logique juridique* (Paris: Librairie Générale de Droit et de Jurisprudence 1965) 178 pp. [Bibliothèque de philosophie du Droit III].

³⁶ Cf. Julius Stone *Legal System and Lawyers' Reasoning* (London: Stevens 1964) xxiv + 454 pp. on p. 195.

³⁷ "A logically closed system—Josef Esser writes in his *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts* 4th ed. (Tübingen: Mohr 1990), p. 218—on the top of which there are deductively fertile major premises is axiomatically oriented." [„Ein logisch geschlossenes Rechtssystem, an dessen Spitze deduktiv ergiebige Obersätze stehen, haben wir als axiomatisch orientiert bezeichnet."]

³⁸ *Ibid.*, especially at p. 44.

³⁹ Stone *Legal System...* [note 37], p. 330.

“[c]learly even the most axiom-oriented legal system will be only very imperfectly so, while even the most rhetorically, (that is, *tópoi*-) oriented legal order has within it numerous axiomatic sub-systems, some of its legal prepositions being apt for use as premises from which solutions can properly be deduced through stringent logical procedures. We are, indeed, accustomed to viewing a legal order as axiomatic to some extent, that is, as containing many major premises from which answers to legal questions can be deduced in a logically guaranteed way.”⁴⁰

Reverting to the German school of legal logic, which possesses a strong axiomatic flavour, one of its most distinguished representatives, ULRICH KLUG, treated both axiomatic system-building and the lawyers’ desire for axiomatic codification of the law.⁴¹ At the same time, he consistently avoided raising the most dramatic issue, notably, its genuine feasibility. Apparently he was not even aware of the lack of deductivity from the law’s notional structure and systemic components. In the final account and paradoxically, the only specific remark he had echoes BOCHENSKI’s opinion that every language, even if not elaborated, is inspired by axiomatism.⁴² ILMAR TAMMELO went further in offering an answer when he criticised the view arising out of “blind obscurantism”, which is constructed as if it were the mere self-centred wish of logicians to systematise law axiomatically. But in fact, when he answered that

“it is up to legal policy to decide whether or not the axiomatisation of law shall take place without the logician having any competence. Yet once a decision is taken, the logician may help”,

he seemed to be responding to the enigma in terms of professional competence in scholarship rather than in terms of the possibility of achieving it in practice.⁴³ Finally, OTA WEINBERGER treated axiomatism, too, as just one of the logical methods, without entering into details as to its difficulties when applied to law. All he concluded is reduced to a blank prophecy, saying that

⁴⁰ *Ibid.*, p. 332.

⁴¹ Ulrich Klug *Juristische Logik* [1951] 3. veränderte Aufl. (Berlin, etc.: Springer 1966) xv + 189 pp. at pp. 15–16 and 174–176.

⁴² Joseph M. Bochenski *Die zeitgenössigen Denkmethoden* 2. Aufl. (München 1959) 93 pp., quoted by Klug, pp. 16 and 174.

⁴³ Ilmar Tammelo *Rechtslogik und materiale Gerechtigkeit* (Frankfurt am Main: Athenäum 1971) 160 pp. [Studien und Texte zur Theorie und Methodologie des Rechts 10], p. 48.

“the logical analysis of legal thought is going to lead to the elaboration of pure deductive systems”.⁴⁴

In addition to these renewed approaches to axiomatism in law,⁴⁵ there is a specific impetus that may have promoted axiomatism in the codes’ systematisation of law. This is the systemic investigation into conceptual sets, launched as a requirement rather than as a modest achievement.

2.4. Drawbacks in Philosophy

The tradition of systemic investigation into conceptual sets in philosophy is hardly sufficient to second the efforts in jurisprudence. Firstly, it concentrates on the analysis peculiar to philosophical systems. Secondly, drawing mainly on KANT’s *Kritik der reinen Vernunft*,⁴⁶ both its issues and entire notional framework are inspired by the methodological limitations set by KANTianism, old and new.⁴⁷

As to the general systems theory and similar interdisciplinary trends, they are mostly preoccupied with dynamic systems in material and social reality. Consequently, conceptualisation in actual systems is secondary for them, seen mostly as a program to be addressed, if at all, in the future.

Considering the fact that neither the theory of science nor scientific methodology has made striking progress in the field, formal logic has remained in charge of conducting research on conceptual systems. And indeed, logic can successfully utilise its entire store of analytic instruments for systems research; the terrain, however, where it can make full use of its properties to achieve results suited to such a purpose is but its most narrow field, notably, axiomatics. Therefore, the circumstance that research in conceptual systems is carried out without change within the competence of logic has eventually deformed research itself, by diverting it onto the forced path of axiomatics. Thereby, the very method of analysis creates an object for itself. Firstly, it addresses the subject with a means and approach alien to the subject’s own speci-

⁴⁴ Ota Weinberger *Rechtslogik* Versuch einer Anwendung moderner Logik auf das juristische Denken (Wien & New York: Springer 1970) xviii + 396 pp. [Forschungen aus Staat und Recht 13], p. 362.

⁴⁵ E.g., Luigi Ferrajoli *Teoria assiomaticizzata del diritto* Parte generale (Milano: Giuffrè 1970) 208 pp. [Pubblicazioni dell’Istituto di filosofia del diritto dell’Università di Roma 3] as well as Jerzy Wróblewski ‘Axiomatization of Legal Theory’ *Rivista internazionale di filosofia del diritto* XLIX (1972) 3, pp. 380–389.

⁴⁶ Immanuel Kant [Kritik der reinen Vernunft, 1781]; cf. http://en.wikipedia.org/wiki/Critique_of_Pure_Reason.

⁴⁷ See, e.g., György Bartók *A »rendszer« filozófiai vizsgálata* [Philosophical investigation of the »system«] (Budapest: Magyar Tudományos Akadémia 1928) 45 pp. [Értekezések a filozófiai és társadalmi tudományok köréből III/5].

ficity. Secondly, this discrepancy with latent antinomy between the subject and approaching it becomes expressed in the subject's manipulation, equalling distortion and falsification. Thirdly, axiomatism prevails with a subject transubstantiated. Or, what may have initially been a legal system, a mobile and dynamic conglomerate of both logical and alogical components, will eventually become a series of deductive conclusions, rigidified and broken into a construction unfolded and crystallised by the manipulator's axioms.

II. AXIOMATISM

3. The Want of Axiomatisability

3.1. From Deductivity to Axiomatisation

To an external observer, human knowledge appears in the form of written texts, involving a definite store of concepts with relations established amongst them. These texts contain pieces of information at various levels. Propositions and the linguistic units carrying them textually are formulated not accidentally but as organised according to a given order, mutually correlated as components of a well-constructed intellectual system. The order manifested in such texts is neither self-determining nor set for itself. It is designed to represent the connections of the object that the text must express on a conceptual level. However, the underlying order may have concurring notional representations. In order for the representation to be adequate, its basic substantive features need to be identical. Or, the notionally schemed order must be partly natural yet partly artificial, reconstructed and constructed at the same time.⁴⁸

⁴⁸ In its time, the Soviet philosophical literature elaborated the thesis of *c o r r e s p o n - d e n c e* between formal and contentual components, and called it the principle of "parallelism of form and contents of thought". Accordingly, their *p a r a l l e l i s m* was thought to be based upon the relative independence of both sides with exclusive operations within their basic correspondence. Г. П. Щедровицкий & Н. Г. Алексеев [G. P. Shtshedrovitskiy & N. G. Alekseev] 'Принцип параллелизма «формы и содержания мышления» и его значение для традиционных логических и психологических исследований' [Printsip parallellizma «formy i so-derzhaniia mysleniia» i ego znachenie dlya traditsionnyh logicheskikh i psihologicheskikh issledovanij / The principle of parallelism of «form and content of thought» and its significance for the traditional logical and psychological research] *Доклады Академии Педагогических Наук РСФСР* [Doklady Akademii Pedagogicheskikh Nauk RSFSR] (1960), paras. 2 and 4.

In case the components of a system are grouped in such a way that its theses are to be logically concluded from one another as necessary consequences, both their connection and the system itself qualify as *deductive ones*.⁴⁹ The further development of deductive systems by re-formulating them at a qualitatively higher level leads to *axiomatisation*. As a strictly consequent formal perfection of the deductivity of systems, axiomatisation amounts to the formal description (or reconstruction) of an already established system, elaborated exclusively in a deductive order. Axiomatic reconstruction is achieved through *meta-language* formulation of theses specified in *object-language* provided by the underlying system. Its phases are rather strict as to the conditions to be met. First, (1) the basic signs to be applied in the system are defined, followed by (2) definition of the formulas suitable to provide expressions of the system, then followed by (3) selection of the basic propositions (*axioms*) from the formulas defined above as well as by (4) determination of the (deductive) rules of inference (or derivation) to be accepted in the system, and finally, to be summed up by (5) conclusion of all the theses (*theorems*) provable within the system, according to the same accepted rules of inference.⁵⁰

3.2. *Futile Approximations at the Most*

By projecting the ARISTOTLE-inspired definition of *axiomatic systems*⁵¹ onto the law after having performed the necessary substitutions,⁵²

⁴⁹ V. N. Sadovskij 'The Deductive Method as a Problem of the Logic of Science' in *Problems of the Logic of Scientific Knowledge* ed. P. V. Tavanec [Problemi logiki nauchnogo poznaniia (Moscow: Nauka 1964)] trans. T. J. Blakeley (Dordrecht: D. Reidel 1970), pp. 160–211 [Synthese Library], and especially on p. 168.

⁵⁰ Sadovskij *ibid.*, pp. 173 and 187.

⁵¹ Georg Klaus *Einführung in die formale Logik* (Berlin: VEB Deutscher Verlag der Wissenschaften 1959) xii + 391 pp. at p. 290. [„ein System *S* von Begriffen und Aussagen, das so beschaffen ist, daß a) alle Urteile von *S* sich auf ein und dasselbe Gebiet von Dingen und Beziehungen zwischen Dingen beziehen; b) jedes Urteil von *S* ein wahres Urteil ist; c) — wenn bestimmte Urteile zu *S* gehören — auch jedes weitere Urteil, das sich aus ihnen nach den Gesetzen der Logik ableiten läßt, zu *S* gehören muß; d) es in *S* eine endliche Menge von Begriffen geben muß, so daß die Bedeutung dieser Begriffe keiner Erklärung bedarf und die Bedeutung aller übrigen Begriffe aus *S* mit Hilfe dieser ersten Gruppe von Begriffen definiert werden kann; e) es in *S* eine endliche Zahl von Urteilen geben muß, die so beschaffen sind, daß ihre Wahrheit evident ist und jedes andere Urteil von *S* sich nach den Gesetzen der Logik daraus ableiten läßt.“]

⁵² The replacement of the category *Urteil* ['judgement'] by 'theses' and the use of 'validity' instead of *Wahrheit* ['truth']. For the intense debates they have otherwise provoked, cf.

we reach a conclusion according to which the law can be conceived of and also treated as

“a system *S* of normative concepts and propositions, whose property is that (a) all theses of *S* relate to the same domain of human behaviours and the relations among such behaviours; (b) all theses of *S* are valid; (c) providing that certain theses belong to *S*, every further thesis inferable from these according to the rules of logic has to belong to *S*; (d) there has to be a finite number of concepts in *S* whose meaning needs no explication, and the meaning of all other concepts belonging to *S* has to be definable by that finite number of concepts; (e) there has to be a finite number of theses in *S* whose validity is evident, and all the further theses of *S* are inferable from that finite number of propositions according to the rules of logic.”

The condition (a) refers to the unity of legal regulation in a wider sense. Condition (b), a *sine qua non* for descriptive propositions stipulating that “all judgements of *S* are true judgements”, is tautological in law as accepted *per definitionem* from the very start. Condition (c) formulates a necessary presupposition for any logical treatment of law, postulating in doctrine [*Rechtsdogmatik*]⁵³ that both the posited norms and their logical consequences are to be taken as propositions of the law at the same level and to the same effect.⁵⁴

As to condition (d), the first specific requirement for the law’s axiomatisation, we are now to encounter rather difficult dilemmas. In the first moment, however, a compromise solution may seem to offer itself. For instance, we could presume that both posited law and its doctrinal study (as engaged in the law’s linguistico-logical processing into a semantically higher-level meta-system), together with the set of principles asserted in standing jurisprudence and its underlying professional ideology, are to embody those principles of interpretation through which the meaning of the law’s

Aleksander Peczenik ‘Doctrinal Study of Law and Science’ *Österreichische Zeitschrift für öffentliches Recht* XVII (1967) 1–2, pp. 128–141 on pp. 129–131 and 134–135; Kazimierz Opalek ‘The Problem of Validity of Law’ *Archivum Juridicum Cracoviense* III (1970), pp. 7–18; and as to the analogy between ‘validity’ and ‘truth’, Georg Henrik von Wright *Norm and Action A Logical Enquiry* (London: Routledge & Kegan Paul 1963) 214 pp. [International Library of Philosophy and Scientific Method], pp. 196–197.

⁵³ Cf. by the author ‘Law and its Doctrinal Study (On Legal Dogmatics)’ *Acta Juridica Hungarica* 49 (2008) 3, pp. 253–274 {& <<http://akademaii.om.hu/content/g352w44h1258427/fulltext.pdf>> }.

⁵⁴ E.g., Jerzy Wróblewski *Zagadnienia teorii wykładni prawa ludowego* (Warszawa: Wydawnictwo Prawnicze 1959) 515 pp. [with ‘Problems of the Theory of the Interpretation of the People’s Law: Summary’, pp. 469–487], pp. 248 and 482, as well as Peczenik, pp. 131–134.

fundamental concepts can be established as evident, and the meaning of all the further concepts as validly accepted.⁵⁵ However, the neuralgic point is not here but on the deductive sequence, on the ability to infer concepts allegedly derived from some fundamental concepts in the given axiomatic system.

If this is so, then law is unsuited to axiomatisation by virtue of the very nature of its concepts, considering the fact that in terms of any system-constructing quality, the very sense of deductivity is alien to them. Or, the basic condition of the law's ability to be axiomatised already remains unfulfilled at a conceptual level. For no law has fundamental concepts with meanings evident in themselves; no principles of interpretation are exhaustively defined by or construable from the system; moreover, the law's concepts are not necessarily inferable from within the system.

Finally, condition (e), specific to law, raises drawbacks even more insurmountable.

(1) A preliminary remark has to be made first. Condition (b) stipulates that "all theses of *S* are valid" and condition (e) stipulates that "there has to be a finite number of theses in *S* whose validity is evident". Accordingly, we have already stated that all the law's components have to be held valid, as the amalgamate of valid and invalid elements in law is *per definitionem* excluded. Indeed, a number of interpretive principles, in the form of enacted rules as well as professional maxims, have been developed for a long time to deprive propositions with no validity within, or that are incompatible with, the system of belonging to that system.⁵⁶ Nevertheless, law is a specific continuum within the unbroken process of norms gaining and losing validity, a continuum with boundaries constantly forming in time.⁵⁷ (As can be noticed, we

⁵⁵ A similar approach is suggested by Wróblewski *Zagadnienia teorii...*, passim; Alf Ross *On Law and Justice* [1953] (London: Stevens 1958) 383 pp. at pp. 138–139; and Stig Jørgensen 'Argumentation and Decision' in *Festkrift til professor dr. jur. et phil. Alf Ross* (København: Jurisforbundet Forlag 1969), pp. 261–284 as well. In fact, all such approaches share the conviction that meaning in law is a function of contexture and that the law's social context of interpretation is part of that contexture. Cf., by the author, 'On the Socially Determined Nature of Legal Reasoning' *Logique et Analyse* (1973), Nos. 61–62 & in *Études de logique juridique* V, publ. Ch[aim] Perelman (Bruxelles: Établissements Émile Bruylant 1973), pp. 21–78.

⁵⁶ See, e.g., Wróblewski *Zagadnienia teorii...* [note 55], pp. 282 & 481.

⁵⁷ Cf., by the author, *Lectures on the Paradigms of Legal Thinking* (Budapest: Akadémiai Kiadó 1999) vii + 279 pp. [Philosophiae Iuris], particularly at para. 6.1. on pp. 203 et seq.

are focussing here on the formal—positivistic—aspect of the very complex notion of validity.⁵⁸ Although this fits better with the specific direction our investigation is taking, the sociological approach to the notion of validity would cause no impediment to our accepting validity as a prime criterion.⁵⁹)

All that notwithstanding, the categories of *t r u t h* (expressing correspondence between reality and its cognition in epistemology) and *v a l i d i t y* (designating the legally normative quality of the regulation) do not have the same position when they comply with the above conditions. For in the case of descriptive propositions, there is a close and somewhat intimate relationship between the truth and the evidence of truth, an organic coupling that is quite alien to norm-propositions. Evidence of truth is revelatory of contents and of the quality in which they are reflected. Evidence of validity tells us only that the respective norm belongs to—through sharing in—the law’s overall normativity.⁶⁰ In contrast to evidence of validity, evidence of truth cannot be self-explanatory or tautological. In his *Philosophical Notebooks*, LENIN also identified the source of axiomatic evidence in the justificatory power of the continuity of man’s practical activity,⁶¹ concluding that axioms “are not true because they are evident, but they are evident because they are true”.⁶² No “transcript” in law of such an allegation—claiming that “norms are not valid because they are obvious but they are obvious because they are valid”—could lead to any plausible result. The norm acquires normative form by gaining normative expression in order to become

⁵⁸ Cf., by the author, ‘Validity’ *Acta Juridica Hungarica* 41 (2000) 3–4, pp. 155–166 {& <<http://www.ingentaconnect.com/content/klu/ajuh/2000/00000041/F0020003/00383612>> & <<http://springer.om.hu/content/mk0r8mu315574066/fulltext.pdf>>}.
⁵⁹ Cf., by the author, ‘Quelques questions...’ [note 10], passim, especially at p. 601.

⁶⁰ Of course, the kind of validity referred to here accords with its *p o s i t i v i s t i c* understanding. Validity in a positivistic sense is indifferent to contents, so it carries the law’s specificity—the “distinctively legal” quality—in the purest form. Its *s o c i o l o g i c a l* sense (which rather than signalling mere belonging—or ascription—to the system, describes actual functioning) remains a formal category on the whole. It asserts the normative quality of norm-propositions belonging to the legal system through having been asserted by (and in) judicial acts and other sociologically significant events. Besides these two senses, one may specify its *c o n t e n t u a l* understanding as a further notion of validity. This relates to the value of norm-propositions with some instrumental value (functionality, suitability, desirability, abstract acceptability, and so on), in view of the law’s purposes accepted within a given circle.

⁶¹ <<http://www.marxists.org/archive/lenin/works/cw/volume38.htm>>.

⁶² Quoted by Klaus *Einführung...* [note 52], p. 291. [„sie sind nicht wahr weil sie evident sind, sondern sie sind evident, weil sie wahr sind”]

separated from both epistemological truth and ontological necessity, while also being freed of any further disputability. This refers to the very fact that validity (like any other element of norm systems) appears as “an artificial human construction”,⁶³ a result of human social activity. Simultaneously, it is applied as a criterion set *vis-à-vis* norm systems as a *sine qua non* of the legal qualification of reality. That is, it has a constructive role in the specific establishment of law’s quality as “distinctively legal”.

(2) Our core problem relates only to the second phrase of condition (e), implicating the cardinal query for the *sine qua non* condition of selecting axioms from theses of the system, in order to construct it deductively in this way.

That is, law can be conceived as an axiomatic system in two ways.

According to alternative (A), the total sum of the laws’ posited provisions shall be taken simply as a set of axioms. Then the posited body of the law, with all its logical consequences, will fill the axiomatic system as a series of axioms, and the theses elaborated by the law’s doctrinal study, concluded deductively from them, as theorems. According to alternative (B), we should distinguish between provisions that provide fundamental regulation and those that only execute the former as subordinate to it. Either solution can only be accepted as failing its presupposition.

(Ad A) The first alternative of axiomatic system-construction is redundant, as it can only offer a pseudo-solution. The qualification of the total sum of enacted provisions as axioms precisely would deprive this artificial system of its specific—axiomatic—character, for the selection of axioms would exclusively be directed by a wholly external factor, namely, by the act of the legislator having posited those provisions. In the case when axiomatic quality is not defined by the suitability of the proposition in question to serve as a foundation stone for system construction, we may scarcely speak of an axiomatic system.⁶⁴

⁶³ Klaus, p. 72. [‘künstliche menschliche Konstruktionen’]

⁶⁴ Kazimierz Opalek & Jan Wolenski *Das Problem der Axiomatisierung des Rechts* {later in *Rechtstheorie und Rechtsinformatik* ed. Günther Winkler (Wien & New York: Springer 1975), pp. 51–66 [Forschungen aus Staat und Recht 32]} (Cracow 1972) 27 pp. [multiplication] also foresaw such a solution (pp. 15–16) by accepting the total set of enacted provisions as a class of independent norms (axioms). Without objecting to or refuting it, they concluded that this cannot be but of a “minimum value” in practice.

(Ad B) By selecting axioms, the other alternative, too, is to create artificial division within the system, as it will distinguish between axioms and normatively posited and not posited propositions as logically inferable theorems.

In order to overcome artificiality, we could state that, as regards the validity of *c o n t e n t s*, both normatively posited and non-positated propositions, once logically inferable, are equivalent. Nevertheless, a division as outlined above could not be without problems. Partly this is because it is by no means likely that we will select our axioms exclusively from among the law's hierarchically upgraded provisions (from a Basic Law or a code's General Part containing the fundamental principles of the regulation). Through this, we would unavoidably contradict the very spirit of the structured law and the normative significance attributed to it. And this is so partly because there is a high probability that axioms will be selected not only from law's normatively posited stuff but through creating some of them, through mental (re)construction, as a logical premise to some normatively posited provisions. Accordingly, our system would be constructed as an artificial set of four components, namely, normatively (1) posited and (2) non-positated axioms and their normatively (3) posited and (4) non-positated logical consequences, taken as theorems.⁶⁵

One of the prerequisites of axiomatisation according to condition (d) is a network of concepts constituting a system that can be arranged in a deductive order. However, as we have seen, concepts of law are not of such a type. In law, as is well known, it is by no means only concepts that resist becoming transformed into a deductive chain of consequences. For propositions defining the mutual relationships and connections amongst concepts withstand deductivity, too, by virtue of their nature shared with one of the concepts. Posited law is scarcely overfilled with norms deducible from law's other norms in a formal, strictly deductive way.⁶⁶ Propositions fundamental to attempts to delineate the

⁶⁵ Opalek & Wolenski, p. 16 also found this option feasible for a procedure when, first, axioms are inductively formulated from the posited stuff of norms, and then, the system's theorems are deduced from them. The criticism the authors asserted seems, however, to focus on a secondary point. The issue of deducibility being left untouched, they are only preoccupied with the consequence that such an implementation will inevitably exceed the boundaries of the underlying system and result in a "substantial overextension", unacceptable for a *Rechtsdogmatik*.

⁶⁶ Wróblewski 'Axiomatization...' [note 46], especially pp. 380–381. The structure of legal systems is described as a complex—at the same time dynamic and static—entity in his 'System of Norms and Legal System' *Rivista internazionale di filosofia del diritto* XLIX (1972) 2, pp. 224–245, especially on pp. 228–229 and 236.

contents of legal systems mostly appear as delimitations—actualisations and concretisations—of purposes set forth through high-level politico-legal documents, the normative regulation of which will mostly provide the definition of those instrumental behaviours that have been selected by the legislator to achieve the desired aims. This is the reason why both the basic arrangement and its regulation in detail—often distinguishable exclusively through a thorough analysis of contexture—are provided by the legislator and in a normative way.⁶⁷ Whereas, if we were indeed in a position to rely on deductivity, the legislator could safely leave the job of deducing systemic theorems from given axioms to either the professionals of doctrine or the law-applier.

Or, as expounded elsewhere,⁶⁸ processes of law-application cannot be reduced to deductive operations. Accordingly, attempts throughout history to eliminate *par excellence* creative moments from judicial processes were always bound to fail.⁶⁹ Nor can doctrinal study be based upon mere deductivity.⁷⁰ In the law's proper domain, be it either made or applied, instead of purely formal logical connections there are only interrelations of contents, which delimit the field of formal deductivity to a sheer hyperbolic ideal.

3.3. *Lack of Deductivity in the Law's Deep Structure*

The very nucleus of any axiomatic system lies in the fact that in some sets of building blocks there are a few foundation stones from which one given building can be built up in one given form while requiring that the operation, in view of the result, can be repeated by any actor at any future time. However, the relationship amongst the constituents of legal systems is not such as to allow them to make up their edifice in exclusively one form, if its axiomatic procedure is defined and some constituents as foundation stones

⁶⁷ Cf., by the author, 'Structures in Legal Systems: Artificiality, Relativity, and Interdependency of Structuring Elements in a Practical (Hermeneutical) Context' *Acta Juridica Hungarica* 43 (2002) 3–4, pp. 219–232 {& <<http://akademiai.com/content/r27863g6u01q777u/fulltext.pdf>> & <<http://akademiai.om.hu/content/r27863g6u01q777u/fulltext.pdf>> & in *La structure des systèmes juridiques* [Collection des rapports, XVI^e Congrès de l'Académie internationale de droit comparé, Brisbane 2002] dir. Olivier Moréteau & Jacques Vanderlinden (Bruxelles: Bruylant 2003), pp. 291–300}.

⁶⁸ Cf. Varga 'On the Socially Determined...' [note 56], *passim*.

⁶⁹ Cf., by the author, 'A törvényhozó közbenső döntése és a hézagproblematika megoldása a francia jogfejlődés tükrében' [The interim decision by the legislator as a way of filling gaps, as overviewed through the French legal development] *Jogtudományi Közlöny* XXVI (1971) 1, pp. 42–45.

⁷⁰ E.g., Peczenik 'Doctrinal Study of Law...' [note 53], pp. 135–138.

are designated. The principle of deductivity is at the heart of all axiomatism. The eventual lack of the deductivity of legal concepts affects directly alternative (B) only. Alternative (A) seems not to be excluded as a task to be undertaken. Or, this alternative could be realised without, however, bringing us closer to the gist of legal axiomatism. Its acceptance would be like claiming to explain the structure of a building by defining its construction procedure and one or two foundation stones assigned to it, but presenting in fact the whole edifice with each and every (different) piece of stone built in as foundation stones, and with each and every concrete (different) manner of their building in as fundamental procedures.

4. The Heuristic Value of an Ideal

4.1. Cases of *N/A*

As the basic characteristics of axiomatic systems are not applicable to law, we have to regard legal systems as *n o n - a x i o m a t i c* and as systems that cannot be axiomatised.

As to the further, accessory properties of axiomatic systems, neither the principle of the *i n d e p e n d e n c e o f a x i o m s*⁷¹ nor that of *i r r e d u c i b i l i t y*⁷² is applicable in law. For, providing that we accept all the normatively posited provisions of the system as axioms (proposal (A)), we exclude the above principles from the outset. Providing that we accept exclusively the system's elaborated basic principles as axioms (proposal (B)), we presume those principles have already been fulfilled from the very beginning.

One of the advantages of axiomatic system construction is that, by revealing the identical structure of seemingly differing theoretical and practical systems, it allows them to be analysed collectively and through synthesis.⁷³ This collectivity is introduced by the term of *i s o m o r p h y* in logic. That is,

⁷¹ According to which none of the axioms can be deduced from any other, serving as the latter's theorem. Klaus *Einführung...* [note 52], p. 303.

⁷² Fulfilled as an improved version of the former, "if each axiom of the system is independent of the conjunction of the other axioms", that is, "if both this very axiom and its logical negation are logically compatible with the conjunctions of the others". Klaus, p. 321. [„wenn jedes Axiom des Systems von der Konjunktion der übrigen unabhängig ist” „wenn sowohl dieses Axiom als auch seine logische Negation mit der Konjunktion der übrigen logisch verträglich ist.”]

⁷³ Cf., e.g., Blanché *L'axiomatique...* [note 23], ch. IV, § 23. LUKÁCS, too, albeit opposed (as flatly hostile) to any formalism in general, welcomed the tendency towards "the mathematisation of all sciences". György Lukács *A különosság mint esztétikai kategória* [Particularity as an aesthetical category] (Budapest: Akadémiai Kiadó 1957) 255 pp. at pp. 149–150.

“[i]f the models differ only in the different character of the specific interpretations regarding their components, and if they coincide totally when we disregard this for the sake of their treatment on a formal axiomatic plane, we say that the models in question are of an isomorphous character as they have quite identical a logical structure”.⁷⁴

Well, in the domain of law, if we cannot speak of isomorphy among systems, the question itself becomes pointless. Although quite a few isomorphous structures can certainly be encountered among the various institutions within a given legal system, their examination points beyond axiomatics. Consequently, *d e p e n d e n c e*—that is, “if the system itself or its logical negation can also be inferred from the other”—is quite alien to legal systems. Thus—apart from some exceptions in the domain of techniques of legislation⁷⁵—we may conclude that any legal system is “logically incidental” compared to other systems.⁷⁶

4.2. Cases of Correlation

However, it does not follow from the law’s inherently non-axiomatic composition that legal systems cannot carry features interpretable within an axiomatic perspective.⁷⁷ Even the law’s geometric ideal can only gain meaning in history if the law has a genuine façade suitable to be brought into connection with the characteristics of axiomatism in some way. Or, our ba-

⁷⁴ Blanché *L’axiomatique...* [note 23], p. 46. [„Lorsque des modèles ne se distinguent ainsi entre eux que par la diversité des interprétations concrètes qu’on donne à leurs termes, et coïncident exactement quand on fait abstraction de celles-ci pour s’installer sur le plan de l’axiomatique, on dit qu’ils sont isomorphes: ils ont en effet même structure logique.”]

⁷⁵ Obviously, there is isomorphy in the exceptional cases that promulgate the same statutory texture in separate jurisdictions. Yet this is irrelevant in the case of logic. Reception of legal texts can become relevant as to isomorphy only provided that either the same basic principles are broken down differently in detailed regulations or differing basic principles are asserted in the same texture of regulation. Properly speaking, the issue of isomorphy is not at stake. Isomorphy is related to the identical structure of systems that are differently interpreted, while reception with variations testifies only to the dialectics inherent in the demand for harmony between basic principles and their detailed breaking down in a regulatory concretisation.

⁷⁶ Klaus *Einführung...* [note 52], p. 321. [„Wir sprechen davon daß ein Axiomensystem von einem anderen *a b h ä n g i g* ist, wenn entweder es selbst oder seine logische Negation aus dem anderen abgeleitet werden kann.” / „logisch zufällig”]

⁷⁷ E.g. Eike von Savigny ‘Zur Rolle der deduktivaxiomatischen Methode in der Rechtswissenschaft’ in *Rechtstheorie Beiträge zur Grundlagendiskussion*, hrsg. Günther Jahr & Werner Maihofer (Frankfurt am Main: Klostermann 1971), pp. 315–351 and Jürgen Rödig ‘Axomatisierbarkeit juristischer Systeme’ in his *Schriften zur juristischen Logik* (Berlin: Springer 1980), pp. 65–90.

sic rejection will reckon with moments suggesting a certain connection notwithstanding.

Although, according to the general theory of science,

“[t]here is something asserting itself as a rule in the development of sciences, driving them in an irreversible sequence in function of their place in the hierarchy along four subsequent phases, that is, the descriptive, the inductive, the deductive, and, finally, the axiomatic ones”,⁷⁸

we may agree with KLAUS that “there is no science which could exclusively be axiomatic-deductive”.⁷⁹ For not even the focus of axiomatisation on formal definition can exclude the fact that—methodologically speaking—axiomatics will be acknowledged as the endpoint of all processes arising from analysis of any concrete totality of material or intellectual phenomena.

“It may occur only in books that axiomatics begins with axioms, for with the axiomatician it is just the axioms where it ends. Namely, axiomatics presupposes substantive deduction to which it gives a shape, which requires lengthy inductive preliminary work in collecting the materials to be organised this way. On such a basis, the axiomatician’s genuine job will be to identify axioms; that is, instead of drawing mere consequences from given principles, he will have, once a set of propositions is given, to find the minimum system of those principles from which the propositions in question can be deduced.”⁸⁰

This is but a concretisation in logic, the epistemological formulation of which was already provided by ENGELS in his crude polemics with DÜHRING:

“The general results of the investigation of the world will only be obtained when the investigation is already over: these are r e s u l t s in accomplish-

⁷⁸ Blanché *L'axiomatique...* [note 23], p. 84. [„Il y a comme une loi du développement des sciences, qui les fait passer, dans un ordre irréversible et chacune à son tour selon le rang qu'elle occupe dans la hiérarchie, par quatre étapes successives: descriptive, inductive, déductive, axiomatique.”]

⁷⁹ Klaus *Einführung...* [note 52], p. 325. [„es keine Wissenschaft gibt, die ausschließlich axiomatisch-deduktiv ist.”]

⁸⁰ Blanché *L'axiomatique...* [note 23], p. 87. [„Ce n'est que dans les livres qu'une axiomatique commence avec les axiomes: dans l'esprit de l'axiomaticien, elle y aboutit. Elle présuppose la déduction matérielle qu'elle met en forme, et celle-ci à son tour a exigé un long travail inductif préalable pour réunir les matériaux qu'elle organise. Sur ces bases, le vrai travail de l'axiomaticien, c'est de dévourir les axiomes: non pas, donc, de déduire les conséquences de principes donnés, mais au contraire, donné un ensemble de propositions, de trouver un système minimal de principes d'où elles se puissent déduire.”]

ment rather than `basic principles` to start on. To construct the former mentally through concluding from the latter as a reliable basis in order to reconstruct the world is sheer ideology”.⁸¹

Or, axiomatic system building is by no means simply a game with signs for themselves, a futile exercise in some vacuum, but a way of systematising knowledge itself. Accordingly, its pattern may become an instrument for theoretical appropriation of the world, albeit its suitability is by no means unlimited. Moreover, if we stated beforehand that there is no system that is exclusively axiomatic, now we may risk the statement pointing in the opposite direction, namely, that there is no system that possesses absolutely no features of axiomatism. For `absolute axiomatism` is an empty category in the same way as is a condition of `absolutely no axiomatism`.

From among other properties relevant here, an axiomatic system can be stated not to be “empty”—as having a “model” that can be “fulfilled”—if there is a system of objects that fulfils the requirements of this axiomatic system.⁸² Well, in theoretical legal thinking it is an old dilemma: under what conditions can the law be claimed to have been fulfilled? The first answer will probably hold that it is so when its provisions are followed generally. Even presuming that the answer has addressed the underlying issue correctly, the question remains, what does the observance of provisions mean in relation to the prohibiting and sanctioning norms of, say, criminal law? Whether or not criminal law has a “model” if its provisions are observed by the non-violation of its norms? Whether or not criminal law has a “model” if the behaviour to be sanctioned is actually sanctioned? Or, to push the analysis further, is a system “fulfilled” if there is no discrepancy between the sanctioning norm and the sanctioned behaviour, but there is no probability of the behaviour to be sanctioned occurring in social practice either? The bare fact of the non-violation of prohibitions—as

⁸¹ Friedrich Engels *Anti-Dühring* in Karl Marx & Friedrich Engels *Werke* 20 (Berlin: Dietz-Verlag 1987), p. 574. [„Die allgemeinen Resultate der Untersuchung der Welt kommen am Ende dieser Untersuchung heraus, sind also nicht Prinzipien, Ausgangspunkte, sondern Resultate, Abschlüsse. Diese aus dem Kopf konstruieren, von ihnen als Grundlage ausgehen und weiter daraus die Welt im Kopf rekonstruieren ist Ideologie”] Or, formulated elsewhere in the same developments, “the principles are not the starting-point of the investigation, but its final result; they are not applied to nature and human history, but abstracted from them” in <http://www.marxists.org/archive/marx/works/download/Engels_Anti_Duhring.pdf>.

⁸² Klaus *Einführung*... [note 52], pp. 320–321. [„erfüllbar”, „leer” & „Modell”]

“their fulfilment is bodiless and invisible”⁸³—reveals only some negativity; yet, it does not inform us whether or not the normative expectation expressed by the prohibition has been socially founded at all, that is, whether or not the prohibited behaviour would have appeared at all in society, in which case it would have not been reacted to by that prohibition. Even the construction of a modern norm-logic with the notion of a “deontically perfect world”—in terms of which a norm-system has a “model” if all its requirements are simultaneously fulfilled⁸⁴—can provide a merely verbal answer. Indeed, with the normative reflection of a segment of the prevailing social reality, the question is no longer only whether or not the system of norms in question disposes of a “model” and whether or not it becomes “fulfilled”. For this very question is part of a more general issue, grasping the specificity of normative “reflection” more directly. And this is whether or not the system of norms translates (mirrors, transforms, etc.) the widely sensed (or, in the usual terminology of MARXism, “objective”) requirements of social reality in the given phase of its development.

The feasibility of formal operations and developments within an axiomatic system may also indicate some commonness of methodology to a certain degree. Logic explains this by the concept of “c o d i f i c a t i o n” [“Kodifikation”], implying that once we specify the “codificate” [“Kodifikat”] (i.e., that which has been “codified”)—to denote the network of concepts constituting the system with its structural framework—, then, within this theory, “any further activity will be the job of formal logic”,⁸⁵ including the critical control of the system with disclosure of the quest for both simplification and resolution of its latent contradictions, if any.

The two pillars of axiomatic system building are f o r m a l c o n - s t r u c t i o n and its d e d u c t i v e d e f i n i t i o n . These are basically not proper to law, yet they may have some aspects within this perspective in which they may become methodologically significant. For instance, the very fact that “in the axioms of the EUCLIDEAN geometry, all propositions of this geometry are in principle involved,”⁸⁶ is characteristic of all axiomatic sys-

⁸³ Jean Carbonnier ‘Effectivité et ineffectivité de la règle de droit’ [1957–1958] in his *Flexible droit* (Paris: Librairie Générale de Droit et de Jurisprudence 1969), pp. 91–103 on p. 95.

⁸⁴ I owe this remark of JAAKKO HINTIKKA to my discussions with JAN WOLENSKI in Cracow in the early 1970s.

⁸⁵ Klaus *Einführung...* [note 52], pp. 322 and 323. [„so wird die ganze übrige Tätigkeit innerhalb dieser Theorie’ zu einer Angelegenheit der formalen Logik.”]

⁸⁶ Klaus *Einführung...* [note 52], p. 319. [„Beispielsweise liegen zwar in den Axiomen der EUKLIDischen Geometrie sämtliche Lehrsätze dieser Geometrie im Prinzip verankert vor.”]

tems. Among norm systems, there are in principle—as theoretical models—so-called static systems, in which the basic norm of validity elevates—by delineating the system’s contentual boundaries as a general condition of validity, using the rules of inference given—the whole system to be a logical consequence of the basic norm.⁸⁷ There is no need to say that such systems are set up scarcely anywhere in practice. Yet in law, norms authorising the issuance of, or extending validity to, certain subordinate norms may be defined in such a way that the conformity (e.g., constitutionality) of the latter to this hierarchically higher level can be adjudicated, for instance, on the basis of the particular being deducible from the general, or of its lack of contradictions, or of its recognition as embodying an instrumental value. On the other hand, there are general principles in law-codes, which may matter especially when treated quasi-axiomatically in the delimitation of the generalisable features of the details of a regulatory arrangement, as well as when a decision is to be made in atypical or borderline cases, or when merely filling gaps in the law is at stake. Or, the contentual superiority of general principles in so-called code systems⁸⁸ does by no means amount to suitability to be taken as axioms in the sense of entailing all the code’s propositions on principle. For general principles as the system’s basic propositions may, by formulating the objectives and overall ethos of the entire regulation, greatly delimit the circle of instrumental behaviours to be specified and legally qualified by that regulation, without, however, defining them, as there is no exclusive, categorical equivalence between the objective set and the way the law may intend to reach it.⁸⁹

What is, therefore, proper to legal systems—instead of formal derivation and consequence—is but a *m u t u a l c o n t e n t u a l r e l a t i o n s h i p*, within which eventual contradictions or disconformities between principles and actual realisations can be detected quite well, but not in a way that can be substituted for by relations of mutual definition and inferability.

Finally, two further basic characteristics should be mentioned as well, characteristics that are (1) requirements formulated in axiomatic systems

⁸⁷ Cf. Wróblewski ‘System of Norms...’ [note 67], pp. 226–227.

⁸⁸ Cf. Imre Szabó ‘Régi és új kérdések a szocialista jogelméletben’ [Old and new questions in socialist legal theory] in his *Szocialista jogelmélet – népi demokratikus jog* [Socialist legal theory – people’s democratic law] (Budapest: Közgazdasági és Jogi Kiadó 1967), pp. 91–124 at pp. 119–120; and also Jerzy Wróblewski ‘The General Principles of Law’ in *Rapports polonais présentés au sixième Congrès international de Droit comparé* (Varsovie: Comité des Sciences juridiques de l’Académie polonaise des Sciences 1962), pp. 218–234 at pp. 220–222.

⁸⁹ Cf., by the author, ‘The Preamble: A Question of Jurisprudence’ *Acta Juridica Academiae Scientiarum Hungaricae* XII (1971) 1–2, pp. 101–128.

as attached directly to their systemic character (rather than to their deductivity), and (2) that are, thus, asserted in law far more directly.

The “requirements of deductive systems have different theoretical-cognitive »force«, according to science theory. “The most important of them is the requirement of *c o n s i s t e n c y* since otherwise the system is ruined. The other requirements have less importance.”⁹⁰

Well, this requirement can be formulated easily. An axiomatic system is consistent if it “does not contain two statements, one of which is the negation of the other.” Or, in other words, it is consistent if “of any two contradictory sentences at least one cannot be proved.”⁹¹ If, therefore, consistency means that “it is not possible to prove from the given axioms both a certain formula *X* and the logical contradiction to *X*”⁹², then, in the domain of law, this will correspond to the requirement that, within the system, any behaviour can be qualified either as *X* or as *non-X*. That is, the same behaviour cannot be regarded as lawful and unlawful by the same system at the same time. Or, *f r e e d o m f r o m c o n t r a d i c t i o n s* is of an extraordinary significance in and for law. In the technological elaboration of its store of instruments, this is one of the primary conditions of the law’s internal “morality”, that is, of its efficient socio-political functioning.⁹³ Simultaneously, this is also a presumed and necessarily postulated element of the legislator’s rationality, which allows and also necessitates kinds of interpretation that can prevent any contradiction that may still be present.⁹⁴

⁹⁰ Sadovskij ‘The Deductive Method...’ [note 50], p. 202.

⁹¹ Sadovskij, p. 200 and Alfred Tarski *Introduction to Logic and to the Methodology of Deductive Sciences* 2nd American ed., 10th printing (New York: Oxford University Press 1963) 239 pp. on p. 239, or (New York: Oxford University Press 1994) 229 pp. on p. 125.

⁹² Klaus *Einführung...* [note 52], p. 300. [„es nicht möglich ist, aus den vorgegebenen Axiomen sowohl eine Formel *X* als auch ihr logisches Gegenteil *X* zu beweisen”]

⁹³ The freedom of contradictions was defined as the basic feature of law (which has to be “an expression coherent in itself”) by ENGELS, and as one of the preconditions of the law’s “*i n n e r m o r a l i t y*”, by Lon L. Fuller *The Morality of Law* (New Haven & London: Yale University Press 1965) viii + 202 pp. [Storrs Lectures on Jurisprudence, 1963], pp. 65–70. For the latter, cf., by the author, ‘Reflections on Law and on its Inner Morality’ *Rivista Internazionale di Filosofia del Diritto* LXII (1985) 3, pp. 439–451 {& ‘The Inner Morality of Law’ *Acta Juridica Academiae Scientiarum Hungaricae* 29 (1987) 1–2, pp. 240–245}.

⁹⁴ Cf. Leszek Nowak *Próba metodologicznej charakterystyki prawnoznawstwa* [Essay on the methodological characteristics of legal knowledge] (Poznan 1968) 205 pp. [Uniwersytet im. Adama Mickiewicza w Poznaniu, Prace wydziału prawa 38], pp. 199–200.

In connection with consistency, the feature of *c a t e g o r i c a l n e s s* as a specifically formulated prerequisite of freedom from contradictions also has to be mentioned. As is well known, in the mid-19th century, JÁNOS BOLYAI and NICOLAI IVANOVICH LOBATCHEVSKY proved as to EUCLIDEAN geometry, the very first system of axioms ever elaborated in scientific development, that all its abstract perfection notwithstanding, it is not the only feasible system of geometry, for when the system becomes reorganised through changing its axiom(s) of, e.g., parallelism, the result can again be a system freed from contradictions, which, within its boundaries, provides a complete answer to all questions that can be raised within that system of geometry. Accordingly, we can state that a system “is not categorical, if a thesis *p* and also its logical negation can be proposed in an axiomatic system”.⁹⁵ Well, while—as we have seen—in axiomatics it might have been conspicuous that EUCLID’s geometry was proved not to be categorical as to, e.g., parallelism, categoricalness in and for law may turn out to be of interest first of all in a positive sense. That is, in law there are so-called *b a s i c p r i n c i p l e s*, mostly particular to given types of legal arrangements.⁹⁶ And this may lead us to the tentative conclusion that, in the final analysis, a legal system is a function of various “basic principles” taken as general theses, characterised by categoricalness. However, legal systems are neither static nor rigidified, and we know from legal sociology what contradictory tendencies law may incorporate and what tensions it may endure until a new start (e.g., through a revolution) brings a break into the system’s development.⁹⁷ Or, the flexibility of legal systems is also a function of their categoricalness to a considerable extent.

Along with consistency, another basic feature of axiomatic systems is the requirement of *c o m p l e t e n e s s*. “A formal system is semantically complete in the absolute sense if every sentence, having value in reference to any model of this system, is inferable in it.” That is, if “every sentence

⁹⁵ Klaus *Einführung...* [note 52], p. 322. [„ist gabelbar, wenn es möglich ist, sowohl einen bestimmten Satz *p* als auch seine logische Negation zum Axiomensystem hinzuzufügen.”]

⁹⁶ For the socio-political bounds of—especially socialist—basic principles, see, by Imre Szabó, *A szocialista jog* [Socialist law] (Budapest: Közgazdasági és Jogi Kiadó 1963) 454 pp. at pp. 454 and 72–79 and ‘Régi és új kérdések...’ [note 89], pp. 122–124. For some principles universalised and thereby also self-emptying, see Zoltán Péteri ‘The Nature of the General Principles of Law’ in *Studies in Jurisprudence for the Sixth International Congress of Comparative Law* ed. Imre Szabó (Budapest: Akadémiai Kiadó 1962), pp. 43–59.

⁹⁷ Cf., e.g., Henri Lévy-Bruhl ‘Tensions et conflits au sein d’un même système juridique’ *Cahiers internationaux de Sociologie* XXX (1961) 1, pp. 35–46.

which is formulated by employing the terms of this theory can be proved or disproved within it.”⁹⁸ Searching for the equivalent of axiomatic completeness in law, we can formulate the concept that a legal system is complete if the qualification of any behaviour covered by the regulation of the given system can be deductively inferred from its propositions. The opposite of completeness is obviously incompleteness, which can be established depending on how we define the boundaries to which the system is related. Usual definitions relate incompleteness to theses either drawn “from the system’s area” or “correctly formulated in terms of the system”.⁹⁹ In this way, applying axiomatism to law we can see that such a logical approach corresponds to a positivistic understanding of gaps in law: both define the system’s boundaries from inside, in the system’s own terms. As opposed to this, a sociological approach may result in a “more complete” concept of completeness, as it draws its boundaries from outside, by assessing the widely felt demands of social reality.¹⁰⁰

There is a recently developed approach that attributes a novel meaning to completeness, according to which “any behaviour is normatively qualified by the norms belonging to that system.”¹⁰¹ This definition, knowing no limits regarding the system’s boundaries, needs to counterbalance boundlessness with an artificial construction. Therefore, it postulates a “general norm of exclusion” as allegedly presumed by the law itself, a norm that labels those behaviours neither prescribed nor permitted by positive norms as “normatively neutral”.¹⁰² In fact, however, the completeness of normative qualifications does not require such an artificial—moreover, with regard to the recognised legality of gap-filling within the system’s boundaries, even self-contradictory—construction to be postulated. For the requirement of completeness relates exclusively to behaviours within (or covered by) the system. What is outside the system is in no way

⁹⁸ Sadovskij ‘The Deductive Method...’ [note 50], p. 202 and Tarski *Introduction...* [note 92], p. 135.

⁹⁹ Klaus *Einführung...* [note 52], pp. 321–322. [„aus dem Gebiet des Systems”] and Blanché *L’axiomatique...* [note 23], pp. 50 [„propositions contradictoires formulées correctement dans les termes du système.”].

¹⁰⁰ For the dichotomic approach of gaps in law and their feasible synthesis, see, by the author, ‘Quelques questions...’ [note 10], pp. 205–241.

¹⁰¹ Wróblewski ‘System of Norms...’ [note 67], p. 230.

¹⁰² Cf., by Amadeo G. Conte, *Saggio sulla completezza degli ordinamenti giuridici* (Torino: Giappichelli 1962) xiv + 245 pp. [Università di Torino, Memorie dell’Istituto Giuridico, Serie II 111] on pp. 79–90 and ‘Norma generale esclusiva’ in *Novissimo Digesto Italiano* XI (Torino: UTET 1965), p. 329, both quoted by Wróblewski ‘System of Norms...’, pp. 231–232.

qualified by the system: it is simply outside the circle to which the system responds. That is, the boundary of the system also delineates the limits within which it provides qualification; and beyond those limits only other systems can be regarded as competent to respond, if such is at all possible. This is to say that our stance, suggested by the axiomatic approach, may contribute to clarification of which systems are to be categorised as either “closed” or “open” ones. A system is *open* if it may qualify beyond its positivistically drawn boundaries as well. And for this very reason, codes of criminal law are *per definitionem* regarded as *closed* ones, as the principle of *nullum crimen sine lege* will both definitely demarcate and also close down the boundaries of the given system.

5. Conclusion: Ideals and the Dialectics of Substantivity

With the present investigations concluded, it seems that the creed of DAVID HILBERT, perhaps one of the greatest representatives of modern mathematics—according to which

“I believe: every possible object of scientific knowledge succumbs, as soon as it is ripe for theorizing about it, to the axiomatic method and thereby indirectly to mathematics.”¹⁰³

—is based on an unproved and unprovable generalisation. Albeit it is true in a figurative sense that “the block is not on the mason’s side, but against him, and the first thing that happens in its shaping seems the most unnatural of

¹⁰³ Followed by stating that “By pressing ahead to ever-deeper layers of axioms in the sense described above we attain also ever deeper insights into the nature of scientific thought itself and become ever more aware of the unity of our knowledge. In the form of the axiomatic method, mathematics appears to be called upon to play a leading role in science at large.” David Hilbert ‘Axiomatisches Denken’ [reprinted in *From Kant to Hilbert A Source Book in the Foundations of Mathematics*, ed. William Bragg Ewald (Oxford: Oxford University Press 1996), pp. 1105–1115] *Mathematische Denken* LXXVIII (1918), p. 415. [„Ich glaube: Alles, was Gegenstand des wissenschaftlichen Denkens überhaupt sein kann, verfällt, sobald es zur Bildung einer Theorie reif ist, der axiomatischen Methode und damit mittelbar der Mathematik. Durch Vordringen zu immer tieferliegenden Schichten von Axiomen im vorhin dargelegten gewinnen wir auch in das Wesen des wissenschaftlichen Denkens immer tiefere Einblicke und werden uns der Einheit unseres Wissens immer mehr bewußt. Im Zeichen der axiomatischen Methode erscheint die Mathematik berufen zu einer führenden Rolle in der Wissenschaft überhaupt.”] {The English translation is taken from <http://sunsite.utk.edu/math_archives./http/hypermail/historia/jun99/0128.html>.

all”¹⁰⁴, yet it is not merely the inertia of the material concerned I mean when referring to law. For legal systems are truly dynamic systems thoroughly built on substantive interconnections. Therefore they resist axiomatisation.¹⁰⁵ At the same time, the s u b s t a n t i v i t y o f i n h e r e n t l y d i a l e c t i c i n t e r r e l a t i o n s may not prevent theoretical reconstruction from treating legal systems in their *sui generis* type of intellectual representations within which “the Parts altogether define the Whole by defining each other mutually”. For such a system may prove to be “not only an organised but an organising unit to finally organise itself into one single entity with Parts organised by the Whole and the Whole prevailing through the Parts organised”.¹⁰⁶

¹⁰⁴ Thomas Mann *The Tables of the Law* [Das Gesetz, 1944] trans. H. T. Lowe-Porter (New York: Alfred A. Knopf 1945), section 15, p. 36.

¹⁰⁵ Alexander Peczenik ‘Jumps and Logic in the Law: What can one Expect from Logical Models of Legal Argumentation?’ *Artificial Intelligence and Law* 4 (1996) 3–4, pp. 297–329 will abstract his final message as follows: “A strict and formal logical analysis cannot give us the full grasp of legal rationality.”

¹⁰⁶ Bartók *A »rendszer«*... [note 48], p. 19.

LAW AND ITS DOCTRINAL STUDY (On Legal Dogmatics)*

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I. THE DOCTRINAL STUDY OF LAW

1. Legal Dogmatics in a Science-theoretical Perspective

The doctrinal study of law is not a scientific field on its own—is not a discipline in either academic sense—, rather it is a pursuit, and the product thereof as its formulation.

One can hardly find a more exacting proclamation of the various possible manifestations of law than that given of the variety of the “languages of law” more than half a century ago by the father of our friend JERZY WRÓBLEWSKI (who passed on fifteen years ago), who—similarly to his son—was also a professor of law. According to this¹ there is, on the one hand, the l a w, and on the other hand, the a p p l i c a t i o n o f l a w, and in between them

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¹ Bronisław Wróblewski *Język prawny i prawniczy* [The language of law and of lawyers] (Kraków 1948) v + 184 pp. [Prace Komisji Prawniczej Polskiej Akademii Umiejętności 3].

one finds the doctrinal study of law and jurisprudence, with their respective languages. In other words, we have the law in books, the stuff of desiderata with normativity derived from its valid positivation, and we have also the law in action composed of series of deductions based on the former in form of actual decisions to convert positive rules into practical reality, within the social understanding of the law's final ordering force in society. Or, the latter as the fulfilment of an expectation is therefore also reality while it keeps on to represent a kind of normativity as well, able to exert normative effects indirectly. Within the domain of law, logically speaking there is nothing other between and above these than mere words (speech-acts) used to represent and operate them in a discourse treating and processing them, which forms a *meta*-system by reformulating them at a higher systemic level. In fact, the very goal of carrying this discourse is exactly this *meta*-system: to discover and to construct—within a *dogmatic* approach—contents believed to be hidden behind the authoritatively manifested nominal forms of the law; contents which can be construed as organised into a coherent system by the tools of linguistic-logical analysis. Or, the goal of such a focus on building some scientific re-representation is to identify “essential” correlations in the law's verbal manifestation of authority, from its phenomenal expression taken as an empirically experiencable (and therefore scientifically reconstructable) aggregate of facts.

It is important to realise that the law and its application are here understood to be two distinct components that either complement or compete with one another, albeit to study the law without simultaneously studying its application could at best be relevant as a within itself contrasted partial analytical investigation covering only particular issues (e.g., in order to analyse the applied law from the perspective of criteria native to positive law, or in order to allow for the formulation of dogmatics built exclusively on the positive law). Apart from that, in every other case the two need to be investigated as parts of one single and integrated unit, since the parallel existence of two separate dogmatics—that of written law & that of jurisprudence—would at the least be simply without reason.

Accordingly, the doctrinal study of law cannot be a scientific field on its own. It too is, instead, *practical action* itself. It is a part, extension, completion, and augmentation of the *praxis* which, almost singularly in the world, treats—artificially—whatever given textual form of the law as the embodiment of the law itself, by inducing whatever legal [*ius*] from the posited texture of the law [*lex*], thereby treating the latter as the starting

point of all departures and theoretical developments, i.e., all reflexive intellectual exercise in law. When students of law, aware of the fallible nature of any textual form, are setting off to produce linguistic-logical projections on (while the systemic reinterpretation of) such texts—and by doing so they inevitably also carry out a critical analysis thereof, increase the rigorousness of the in-built presuppositions, resolve latent contradictions, fill in the obvious gaps, and decode the meaning of (or, properly speaking, gives professional meaning to) their terms and concepts along the line of a uniform logic, and then produce a coherent logical system based on and as an ultimate result of all of these—, they play a role in the development of law, in its timely completion. When doing so, the scholar does work that naturally could in fact have been done by those having drafted the law (since the desire for and expectation of just such a finalisation could already be detected as early as in the compilation of 15th century European customary law, similarly to other compilations akin to WERBÖCZY's *Tripartitum*,² in order to then—starting with the large codification work dated to the French *Code civil*—eventually reach its perfect form hardly surpassed to this day); all of this, however, did not and can in fact not render unnecessary the subsequent integration of the refining feedback (repeatedly, as conditions and practices do change incessantly) by those demanding cultivators of theorised praxis who undertake this doctrinal system-building as authors. For it is to be remembered that not one single attempt at it is logically necessary but is alternative and concurrent, i.e., displaying a certain (practice-boundly theorised) optimum at the most.

Most of our large operational systems (our factories, bridges, hydroelectric power generating plants, similarly to our computer-based capacities) have once been designed by scientific talents, nevertheless, their related products are not the stuff of science, rather, at the most these are purely practical applications borne out of the marriage of science and certain results of various other forms of human understanding. So not even the doctrinal study of law does “cognitively recognise”, instead it gives a more sophisticated, linguistically-logically organised, thus higher-level form to a formal manifestation, which otherwise bears meaning just in

² Cf. as an entry in <http://en.wikipedia.org/wiki/István_Werbőczy>, and The Customary Law of the Renowned Kingdom of Hungary *The »Tripartitum«* A Work in Three Parts Rendered by Stephen Werbőczy, ed. and trans. János M. Bak, Péter Banyó & Martyn Rady, introd. László Péter (Idyllwild, Ca.: Charles Schlacks & Budapest: Department of Medieval Studies [of the] Central European University 2005) xlviii + 473 pp. [The Laws of the Medieval Kingdom of Hungary 5].

and as bound to its given arbitrary appearance. Consequently, no results of dogmatics can be verified or falsified. We must make our surroundings habitable, we must cleanse our things, and it is a sign of careful practice and good practicality as well if we organise our beads and buttons according to some principle. Furthermore, while we are busy at work we may come to gain some deep understanding; however, with all of this—either at the time of the process itself or at a later revisiting of the issue—we do not advance the knowledge itself, instead we merely reduce the incidental nature or somewhat increase the utility of our things by our act of creating order *via* organisation.

Thus, the cultivation of legal dogmatics is a practical step in the direction of the positivism's geometrical law-ideal, which goes past the mere positing of law, which in all of its attempted forms remains *contingent*. Occasionally, of course, it can be increasingly tight, but it cannot reach such a degree of correlation, equivalency and systemic coherence that would by its very nature exclude the possibility of other (re)constructions.³

As soon as this attempt at refining the system by way of internal clarification reaches a certain depth, it could in fact require further breaking-down which can either manifest itself at the level of the whole of the legal system, or distributed among the various branches of law. Nevertheless, we are well advised to remember that as soon as we elevate our attention from the level of a given branch of law (which is tied together by a singular set of professional specifications) to the level of the entire legal system (which is comprised of the units of the branches, and which is rather more randomised in nature), we are proportionally less likely to encounter the systemic self-discipline that could be characteristic of the lower levels, and as a result we are left with fewer and fewer items that would be (otherwise) required for the comprehensive and methodical development of a systemic conceptual re-construction of the law.⁴

³ For the immanent limits of axiomatism in law cf., by the author, 'The Quest for Formalism in Law: Ideals of Systemicity and Axiomatisability between Utopianism and Heuristic Assertion' *Acta Juridica Hungarica* 50 (2009) 1, pp. 1–30 {and shortened as 'Heuristic Value of the Axiomatic Model in Law' in *Auf dem Weg zur Idee der Gerechtigkeit* Gedenkschrift für Ilmar Tammelo, hrsg. mit Raimund Jakob, Lothar Philipps, Erich Schweighofer (Münster, etc.: Lit Verlag 2009), pp. 119–126 [Austria: Forschung und Wissenschaft – Rechtswissenschaft 3]}.

⁴ We can only introduce this as a distant analogy: an attempt to repeat the axiomatic founding and deductibility-expectation, which was thought to have been achieved in individual branches of science (physics, chemistry, biology, etc.)—spellbound by the allure of "unified science"—, in hope of reaching a supposed *final founding* that would unify (by bringing to a common denominator) the paradigms of all the various branches of science, has already

2. The Process of Advancing Conceptualisation

Consequently, when we conceptualise available linguistic material—to be treated with semantics and logics—according to some legal systemicity, we are in fact creating some taxonomic *locus/loci* comprised of what is/are essentially random word/s, which is/are used for lack of a better way of communication. However, this way of forming taxonomic units itself is potentially in a constant change and flux, since the matter of what and where (and at which level) will end up becoming a demarcating item (i.e., a taxonomic identifier) is contingent on—among other things—a certain internal dynamic, and is dependent on a certain fluctuation; and the issue of what will function in quality of exactly what will have only been defined by the entire contexture of the system (e.g., the mere functionality of what can serve as rule or principle, or the way in which the same words used in different branches can indeed have differing meanings).⁵ Similarly, it is the whole system that is at potential stake as a result of conceptual division, classification, categorisation, hierarchisation, in result of mental operations. Yet, it is not the case that simply w o r d s turn into c o n c e p t s⁶ and are

led to a disappointing failure, since human science itself in its fallible human manifestation has eventually proven to be contingent.

Similarly, it is theoretically possible to attempt to establish a final doctrinal assessment of the various stylistic ideals that may have characterised a certain art form in different historical periods, but to do so in a general sense, and in the broader context of perhaps differing styles, and even more so, with regard to different branches of art, seems like an unreasonable effort in the long run.

For their first classical syntheses, cf. *International Encyclopedia of Unified Science* ed.-in-chief Otto Neurath, ed. Rudolf Carnap & Charles W. Morris (Chicago: University of Chicago Press 1938–) {I–II reprint 1969–} and Heinrich Wölfflin *Kunstgeschichtliche Grundbegriffe Das Problem der Stilentwicklung in der neueren Kunst* (München: Hugo Bruckmann Verlag 1915) xx + 255 pp. {*Principles of Art History* The Problem of the Development of Style in Later Art, trans. M. D. Hottinger (New York: Dover 1950) xvi + 237 pp. [Dover Books in Art History]}, respectively.

⁵ Cf., by the author, ‘Structures in Legal Systems: Artificiality, Relativity, and Interdependency of Structuring Elements in a Practical (Hermeneutical) Context’ *Acta Juridica Hungarica* 43 (2002) 3–4, pp. 219–232 {as well as in *La structure des systèmes juridiques* [Collection des rapports, XVI^e Congrès de l’Académie internationale de droit comparé, Brisbane 2002] dir. Olivier Moréteau & Jacques Vanderlinden (Bruxelles: Bruylant 2003), pp. 291–300}.

⁶ This is what I have already attempted to show when stating that the concept of ‘rule’ is common to all arrangements in Western law, while the concept of ‘norm’ is specific only to the Continent. Cf., by the author, ‘Differing Mentalities of Civil Law and Common Law? The Issue of Logic in Law’ *Acta Juridica Hungarica* 48 (2007) 4, pp. 401–410 {& <<http://akademaii.om.content/b0m8x6722752219/fulltext.pdf>>, earlier as ‘Rule and/or Norm, or the Conceptua-

then manipulated further within some logical chain; what is at the heart of the matter is rather that all these can serve as building blocks of and foundations for a *meta*-system, the properties of which will have been defined through their integration into this *meta*-system. Furthermore, it is such a *meta*-system which is the tighter the more contingent; hence, it could potentially be different (differently executed and construed) based on the same posited material underneath it.

It is certainly an overly simplified approach if we imagine a vision of bipolar existence, where on the one end there is the “stuff of language”—clothed in its given form at any given time—and, on the other end, legal dogmatics, as a sort of dressing up of the previous in the cloak of “legal taxonomy”. In reality, however, they can be pictured as flowing waves that are always positioned at opposing phases of some sort of a ‘vision of existence’. As soon as we have “law”, its very first analytical understanding brings about the sprouting of some sort of “dogmatics”; and as soon as this understanding is transposed into the dogmatic realm, its very first practical application will in turn also contribute to having a richer legal quality. Consequently, whatever advancement is exhibited, the given law and its dogmatic counterpart prove to be mutually preconditioned. When making choices in the presence of alternatives, choosing according to preferences, siding with one of several differing (competing) conceptualisations, and opting for one technical procedure over another, it always increases the contingency of the given doctrinal variant; while, by the same token, the broader contexts of policy efforts directed at law or of social order-ideals manifested in law may also re-posit dogmatic arrangements at a higher taxonomic place.

Nevertheless, this counteracting wave-like dynamic formed between the law and its dogmatics not only acts as a constantly relativising force, which makes law dependent on dogmatics and vice versa, but it also prevents the formation of such a static state, where there could be any reasonable discussion of systemic immutability, a fixed state of constancy, or even any ultimate linguistical-logical equivalency. Therefore, we can only address the systemic nature of the actual state or its tightness, in which the major strands and sidetracks of the act of system-creation—re-

lisibility and Logifiability of Law’ in *Effizienz von e-Lösungen in Staat und Gesellschaft* Aktuelle Fragen der Rechtsinformatik (Tagungsband der 8. Internationalen Rechtsinformatik Symposions, IRIS 2005) ed. Erich Schweighofer, Doris Liebwald, Silvia Angeneder & Thomas Menzel (Stuttgart, München, Hannover, Berlin, Weimar & Dresden: Richard Boorberg Verlag 2005), pp. 58–65}.

ardless of whether we speak of logical or linguistic correlation (deduction or any act of connection: assignment or co-ordination)—can, theoretically, be reconstituted by other components in a new order, as a result of any actual (formal or hermeneutical) change occurring at either the “top” or the “bottom” of the original operational chain. Regardless of what great strides Continental law (the rule-set of which is made normative also through its dogmatics while reestablished as a sphere of interrelated norms) has made toward distancing itself from the traditions of classic Roman law (which was developed further by way of the classic Anglo-Saxon law doctrine in its own manner), it is, nevertheless, subject to change with respect to its dogmatics, initiated by whatever new challenge, or newly manifested factor rising out of the application of law (or any force of theoretical nature having an effect on the application of law), and this change can lead to reorganisation of the dogmatic structure of Continental law. Somewhat this is similar to how in Anglo-Saxon case-law the method of *distinguishing* can result in the reevaluation, or reinterpretation of the message that can be deciphered from any newly presented particular case, more precisely, the judge’s rendering of the law (“by declaring what the law is”) is always conditional on the case-specific evaluation of prior decisions, when the actual adjudicative assessment of facts may alter the message presented by precedents.

Consequently, dogmatics, on the one hand (and as such, at the same time, we can state that dogmatics remains dogmatics so long as and because it) carries the promise of *c o m p l e t e n e s s*, and on the other hand, is always transient in nature, because at any given time it is *m e r e l y* in the state of *d e v e l o p m e n t*. Dogmatics has an inalienable dual nature, regardless of the fact that we either deduce its existence from the notion that “we must make a decision that results in action, and in our decision-making we cannot rely on certainty”,⁷ or we ascribe it an allegedly completed systemic quality derived from its being (as it is) the exclusive form of the manifestation of law—one that therefore (for all intents and purposes) is an axiomatically established given, as it is simply posited that way—while being cognisant of the brutal fact that the same exclusive form through which the law has been normatively posited and thereby also materialised is arbitrary; and thus eventually we do recognise just in its random and fallible character a hypothetised systemic quality, which at the same time may re-

⁷ Miklós Szabó *Ars Iuris* A jogdogmatika alapjai [The foundations of legal dogmatics] (Miskolc: Bibor Kiadó 2005) 313 pp. [Prudentia Iuris 24], p. 18.

quire expounding, clarification, and the process of making it explicit.⁸ Regardless of whatever extent its structure is conceptually completed, in relation to meeting specific practical challenges it still manifests itself in casual answers; and this too do therefore mean that—similarly to English law—it only serves up *examples*, from the outset foregoing the expectation of exhaustive comprehensiveness. (It can only be explained as an example of our human fallibility that when acting, we believe our response to be comprehensively completed, while its completeness is merely a given, dependent on whatever we have in our imagination about normality, about what we expect to occur and therefore whatever we deem ought to be sub-

⁸ And this is the essence of the long debated Hungarian doctrine of the “invisible constitution” as well: it postulates an undefined dogmatics, as if it were something floating above the text of the posited Constitution, and as such as something that the Constitutional Court relies on in its decision making, when it passes down rulings without sufficient normative basis (i.e., in absence of a specific constitutional rule). Cf., by the author, ‘Legal Renovation through Constitutional Judiciary?’ in *Hungary’s Legal Assistance Experiences in the Age of Globalization* ed. Mamoru Sadakata (Nagoya: Nagoya University Graduate School of Law Center for Asian Legal Exchange 2006), pp. 287–312 as well as—in an expanded version—‘Creeping Renovation of Law through Constitutional Judiciary?’ in his *Transition? To Rule of Law? Constitutionalism and Transitional Justice Challenged in Central & Eastern Europe* (Pomáz: Kráter 2008), pp. 117–160 [PoLiSz Series 7]. In this sense the doctrine of the “invisible constitution” is a retrospective substitute justification, and is not a prospective product borne out of the progress demonstrated by the functioning of the Constitutional Court; and this is exactly why the practice of relying on these virtual rules quickly died off as soon as the Constitutional Court disassociated itself from the ambitions of its first, founding president, and thus distanced itself from the concept that its primary role would be to expand the Constitution in a latent but active manner, yet without appropriate mandate. Consequently, the claim that this “invisible constitution” too is part of the “hierarchy of the sources of the law”, as “a possible (and since held by the Constitutional Court: binding) interpretation of the Constitution”—András Jakab *A magyar jogrendszer szerkezete* {PhD értekezés} [PhD thesis on the structure of the Hungarian legal system] (Miskolc 2005), pp. 99–100—is fundamentally misleading when observed from this perspective.

⁹ As methodic precursor of the American “Law and Literature” movement, James Boyd White *The Legal Imagination Studies in the Nature of Legal Thought and Expression* (Boston & Toronto: Little, Brown & Co. 1973) xxv + 986 pp. was only to reinvent the quasi ontological significance of “legal imagination”, which had already represented—for Carl Schmitt *Gesetz und Urteil Eine Untersuchung zum Problem der Rechtspraxis* (Berlin: Otto Liebmann 1912) vi + 129 pp. {reprint (München: Beck 2009)}—the genuine borderline (never either improved or surpassed by Kelsen) within which juridicity might at all be conceived. Cf., by the author, ‘Change of Paradigms in Legal Reconstruction (Carl Schmitt and the Temptation to Finally Reach a Synthesis)’ in *Perspectives on Jurisprudence Essays in Honor of Jes Bjarup*, ed. Peter Wahlgren (Stockholm: Stockholm Institute for Scandinavian Law 2005) [= Scandinavian Studies in Law 48], pp. 517–529 {& *Rivista internazionale di Filosofia del Diritto* [Roma] LXXXI (ottobre / dicembre 2004) 4, pp. 691–707}.

ject to regulation.⁹) To put it differently, it is of an open texture, since—as stated earlier, when discussing culture¹⁰—it carries the potential that “it could have been otherwise as well”, even if it happens not yet or already not to become something else. By the same token, however—and this is the other pole of the dogmatics’ dual nature—at any given time it claims to be finite and final (self-closing) in its given state, as if—although probably it may reopen the very next day—it were to live on unchanged forever as the very stuff of eternity.

Finally, there is yet another factor in the systemicity of legal dogmatics. Namely, even its relative permanence is just a matter of reconstruction, a function of the chosen perspective. Perhaps one may find fixed structural points in a system carrying the promise of remaining unchanged over time only provided that we identify the root of permanence in its logical nature, as a systemic axiom. However, once—just as with theologies constructed on revelations, which are the models for the doctrinal study of law¹¹—we start searching for decoding, understanding, or giving meaning(s) behind the authoritativeness imposed by the holy text (the dogmatics of which, although, still may appear in a logically constructed conceptualised form, nevertheless, already in a hermeneutic context, thus, all in all, in the culturally predetermined duality comprised by the historical permanence of the physical nature of its signs and the historically bound and self-fixingly varying nature of their meanings),¹² we must recognise that we are faced with a progressive chain of development. This is merely to recapture the world of the acting man which he had previously positioned in the past to be beyond his personal sphere of influence—of course without having more or a different influence over the end result of the process (due to having been elevated to being the subject from the position of being just a mere

¹⁰ András Karácsony ‘A jog mint kulturális jelenség’ [Law as a cultural phenomenon] *Jogelméleti Szemle* 2002/4 <<http://jesz.ajk.elte.hu/karacsony11.html>>.

¹¹ Cf., e.g., Julius Kraft ‘Über das methodische Verhältnis der Jurisprudenz zur Theologie’ *Revue internationale de la théorie du droit* 3 (1928–29), pp. 52–56 {& ‘On the Methodical Relationship between Jurisprudence and Theology’ [trans. Neil Duxbury] *Law and Critique* 4 (March 1993) 1, pp. 117–123}.

¹² Cf., by the author, ‘Legal Traditions? In Search for Families and Cultures of Law’ in *Legal Theory / Teoría del derecho Legal Positivism and Conceptual Analysis / Postivismo jurídico y análisis conceptual: Proceedings of the 22nd IVR World Congress Granada 2005, I*, ed. José Juan Moreso (Stuttgart: Steiner 2007), pp. 181–193 [ARSP Beiheft 106] {& in <<http://www2.law.uu.nl/priv/AIDC/PDF%20files/IA/IA%20-%20Hungary.pdf>> as well as *Acta Juridica Hungarica* 46 (2005) 3–4, pp. 177–197 & <<http://www.akademiai.com/content/f4q29175h0174R11/fulltext.pdf>>}.

reference), than the amount he had previously believed (at least according to his subjective perception) to have had.

However, if in fact every newly evolved state of the law does indeed (theoretically speaking) reorganise the doctrinal study of law—that is, if law and its doctrinal study are in constant interaction and are therefore moving following a wave-like pattern with relation to one another, and thus constantly providing each other with new *impetuses*—, it can also be supposed that legal policy has a similar relationship of accompaniment with dogmatics. This is so because the latter is not an independent acting factor: it only demonstrates the extent and direction to which law in action is established, planned, harmonised, and co-ordinated in either legislation or the application of law.¹³ Well, even in this respect the doctrinal study of law does not herald creative novelty, neither does it exhibit an independent character, since all the while the effort to render the conceptual base and systemic potentialities as uniform and coherent as possible still happens in this very same sphere and is taking place in this context.

3. Ideality *versus* Practicality in Legal Systemicity

It is worth pausing for a moment to consider, what is the exact status of those sets of meanings which are suggested by those kinds of differentiations, according to which—for example—“the thinking governing the doctrinal study of law is limited not by rules of positive law as »dogmas«, rather by those background category sets which may have affected the shaping of these rules in the process of their formation”.¹⁴ I guess the very heart of this matter is that on an analytical level we first distinguish two different kinds of intellectual representations and subsequently we discern an effect/result-type primacy, or temporal priority between them.

¹³ Cf., by the author, ‘Towards an Autonomous Legal Policy?’ [abstract] in [23rd World IVR Congress of Philosophy of Law and Social Philosophy] *Law and Legal Cultures in the 21st Century: Diversity and Unity Working Groups Abstracts* (Kraków: Jagiellonian University Press 2007), p. 111 {& <www.law.uj.edu.pl/ivr2007/Abstracts_WG.pdf>}. {For an earlier version, cf. his ‘Für die Selbstständigkeit der Rechtspolitik’ in *Die rechtstheoretischen Probleme von der wissenschaftlichen Grundlegung der Rechtspolitik* hrsg. Mihály Samu (Budapest: Igazságügyi Minisztérium Tudományos és Tájékoztatási Főosztály 1986), pp. 283–294 [Igazságügyi Minisztérium Tudományos és Tájékoztatási Főosztály kiadványai 15].}

¹⁴ Szabó *Ars Iuris* [note 7], p. 155 [the emphasis is by Cs.V.].

If we understand something, this understanding can only stem from the fact that we already possess the ability to intellectually conquer the subject of our theoretical investigation by the means of categorisation and classification, i.e., by way of comparing it to something already decoded and thereby subjected to relative identification and differentiation. Or, on the one hand we have the intellectual *facultas* to do processing, and on the other we are in possession of the results of prior processing (as *experimentum*). Consequently, we have already a certain degree of routinised (and to a great extent also confirmed) practice, following which this *comparatio* can be carried out sufficiently. It would, however, not be meaningful to identify either pole or section as an absolute starting point, thereby attributing primacy or priority to any of them,¹⁵ since—as far as it can at all be meaningful to establish such differentiation once a given degree of complexity has been reached—we cannot think more of the process than one developing in native reciprocity and necessary complementarity, becoming increasingly more complex in its potential. Therefore, there is no factor that would prevent the linguistic manifestation of such ‘background category sets’ to—coincidentally—correspond exactly to the way those ‘rules of positive law’ are posited verbally. At the same time it is obvious that any act of drafting new regulation rests on an existing doctrinal assumption, and in most cases it will carry the potential of integration of the new (conceptually split or divided) doctrinal relations into the systemic structure of the existing scheme.

There are always theoretical possibilities, but the law does not and cannot have an idealistically perfect, finished, and closed system, due to the fact that law itself is practical action, a response given to particular challenges, and thereby a model creation achieved by way of normatively ascribing prospective targets to retrospective fundamentals. When the wise men of early modern times were contemplating the comprehensive description of the world in terms of natural laws, they could posit the presumptive existence of a “mathematical value” within the system as something that would necessarily follow from their having comprehensively discovered the nature of economic processes. However, as they quickly recognised it as well, no large degree of comprehension is realistic, due to the ever changing disposition of the infinite number of

¹⁵ In contrast with the view of Friedrich A. Hayek ‘The Primacy of the Abstract’ [1968] in his *New Studies In Philosophy, Politics, Economics and the History of Ideas* (London & Henley: Routledge & Kegan Paul 1978), pp. 35–49, attributing primacy to the ability of abstraction—*versus* concrete observation—in his debating on cognition.

players and further relevant factors involved, which is to render the system too complex for the human faculties of comprehension to have a sufficient match.¹⁶ While they did in fact accept the task of trying to realise some sort of an ideal, yet they also accepted the foreseeably inevitable defeat in their effort to directly realise it. Therefore, although we may indeed have ideals, but only ones that are necessarily bound as constrained by the presence of finite objectives and surrounded by adequate practical conditions. For we can hardly do more at any given instance than gravitate toward the next challenge in trying to meet it, thus attempting to give meaning to our presence here on this planet.

4. Conceptualisation, Systematisation, Dogmatisation

The Roman law's reception sprouting mostly from Italian seeds and spreading over the course of centuries led to the development of two fundamentals on the European continent, and the tracing of the ideal of *ius* back to *lex* was to implicitly contain both.

First and foremost, whatever the legislator has posited constitutes law itself, comprehensively, exhaustively, and with exclusivity. This is the common mental core relied on originally when the European doctrine on the sources of law started to develop, in terms of which the legislative act of positing a law is to be treated as the source of the law. In ontic terms, for the continental tradition law is manifested with and by this; and from a gnoseological perspective this provides the starting point for all inquiries into law. It is in this that the idea exclusive to the Continental law's *applicatio iuris* is born: law is something artificially established as physically perceptible, objectified, discreetly separate entity, valid on its own, which, when applied, is transformed to be of utility for a derivative product prepared by the judge for adjudicating—as a synthetic construct—on a statement of fact.¹⁷ This

¹⁶ Or, all this complexity is cognisable only for God—as opinioned both by Luis de Molina *De iustitia et iure* (Cuenca 1593 & Tomi sex: Coloniae Agrippinae 1613), tomus II, dispositio 347, 3 and Johannes de Lugo *Disputationum de iustitia et iure* Tomus secundus (Lyon 1642), dispositio 26, sectio 4, 40. See Hayek, p. 28, note 5.

¹⁷ It follows directly from this that the concept of *Tatbestand* [the statement of those facts that constitute a case in law] has been included in the conceptual set of Continental law—and only of Continental law—with due cause in due time. The so-called conclusion of fact is a product of legal dogmatics: a logically constructed complementary pair of the norm concept, which allows the schematisation mounted on a syllogistic conclusion—set off from the act of *Rechtssetzung* [*création du droit*, etc.]—in the operation called *Rechtsanwendung* [*application du droit*, etc.].

being in vivid contrast with the Anglo-Saxon model, which (in contrast with the late republican and imperial periods) having derived inspiration from Roman models older still, is only capable of capturing the presence of law in the case-by-case actualisation of the ideal of justice through the judge's decision itself, "declaring" the search to find *a posteriori* the *dikaion*—the most fitting, fair and just resolution in the given individual situation—to have culminated in attainment.

Secondly, the continental tradition perceives in law a message that has already reached a certain level of *g e n e r a l i t y*, a set of experiences of prior decisions which have been captured in the form of *regolas*, which—if objectified—can govern, make uniform, and guide into preestablishedly foreseeable and predictable channels any procedure carried out in the name of the law. Accordingly, law is a *p a t t e r n o f f u t u r e d e c i s i o n s f o r m u l a t e d i n g e n e r a l i t y*. All this in contrast with the Anglo-Saxon perception, which does not discern more in what is manifested as law than a particular case-specific and exemplary manifestation, which—if we or anyone else were to have perceived the case at hand differently from the way the presiding judge saw it—just as well could have been different. Thus, continental *Rechtssetzung* always constructs against the force of some sort of *vacuum*, because wherever *création du droit* enters with *legis latio*, there law appears in place of what had previously been empty space—all this in contrast to the Anglo-Saxon mentality, where even the feasible professionalisation of law-making and its conversion into industrial-scale production does not result in any completion of "the law" (with senses of finality, roundedness or fulfilment), rather at best it only exemplifies: it merely sheds (recalls, manifests) an exemplary and rather commendable light on a smaller portion of what is presumed to have ever existed as law behind it, through the occasional judicial act of eventually naming it.¹⁸

The *c o n c e p t u a l i s a t i o n* of law—that is, the elaboration and treatment of linguistic elements describing legal relations in sets of con-

¹⁸ For instance, according to OLIVER WENDELL HOLMES, generalisation means reduction. On his turn, Justice BRANDEIS had concluded therefrom that

"The process of inclusion and exclusion, so often applied in developing a rule, cannot end with its first enunciation. The rule as announced must be tentative. For the many and varying facts to which it will be applied cannot be foreseen. Modification implies growth. It is the life of the law."

in *Washington v. Dawson & Co.*, 264 U.S. 219, 236. Cf. also Benjamin N. Cardozo 'Law and Literature' [1925] in his *Law and Literature and Other Essays and Addresses* (New York: Harcourt, Brace and Co. 1931), pp. 8 and 15.

cepts as components of logically erected constructs, organised into some coherently arranged overall set to build up its *s y s t e m i c i t y*—will be achieved in such an understanding of the law as exhaustively *e m b o d i e d* by its *p o s i t e d g e n e r a l i t y*, and as the outcome of mental operations with texts of the law itself in its reconstruction at a *meta*-level which is intellectually erected upon it. Well, the doctrinal study of law can be characterised as system of interrelations mentally deconstructed from the primary manifestations of the law, that is, as a secondary *meta*-level fortified by its own comprehensive systemic construct built upon the primary text core.¹⁹ It follows directly therefrom that legal dogmatics only formed, could have formed, and does in fact form where the law manifests itself in form of textual objectification; consequently all procedures carried out in the name of law have to be based on formal linguistic-logical operations of text-processing. Wherever the current ideal of law and order spreads beyond the mere (formal) quality of text-conformity—either due simply to the actual lack of such textuality (as in the Anglo-Saxon tradition), or because the text, in addition to its own self-referential finality, sets the prerequisite additional requirement of a personal ethical conviction in sync with or directed at the fulfilment of given values, sourced from the transcendental power having revealed the text itself (as in classic Jewish or Islamic law)²⁰—, there is (and can be) no legal dogmatics. The very thought of legal dogmatics is simply alien to the *ordo*-ideal and operational principles of such classic, non-systemic arrangements. As the Common Law has for long established it, guidance derived from relatable precedents (properly speaking, from their judicial evaluation) is dependent on the singularity of particular cases; and the model cases used as examples for referencing represent a set of unrelated unique circumstances, among which nothing would necessarily tie them together in a formal way, so there is no logical connection between them either.²¹ (Characteristically enough, it was the English approach to logic—as opposed to its German understanding—which made it obvious that logic itself is not the study of entities, occurrences, or any other capacities taken in their by chance aggregate, rather it is the inquiry into relations that are said to prevail exclusively within the one same system amongst its theorised elements, accepted as potentially arguable as proven or valid in

¹⁹ Cf. Béla Pokol *jogbölcséleti vizsgálódások* [Legal-philosophical inquiries] [1994] 2nd enlarged ed. (Budapest: Nemzeti Tankönyvkiadó Rt. 1998) 159 pp. at p. 44.

²⁰ Cf. Varga ‘Legal Traditions?’ [note 12], *passim*.

²¹ *Ibidem*.

order to test their infra-systemic coherence, i.e., consequentiality to the exclusion of latent contradictions.²²)

This is why the doctrinal study of law is a characteristically continental product of Middle Ages and early Modern Times in Europe. It formed as a result of how, starting from 15th century Bologna, our ancestors received Roman law according to the contemporaneous scientific ideal and the consequentialism in their order-ideal. This essentially axiomatic ideal of order following the methodology of geometry and mathematics was continuously cultivated for centuries, leading to the formation of such a solid secondary tear in scientific analytical work (providing the law with a self-referential framework for interpretation) built around (and above) the actual primary tear of the law, which in the early Modern Times, when the law codification of nation-states (as an act of reestablishing national unity) was done with an attempt to link specifically the law, as well as its application and scholarly processing, back to the exegesis of those posited codes of national laws. Well, at that time jurisprudence itself was proposed for a model of dogmatics, *Begriffsjurisprudenz* or *conceptual jurisprudence*, containing both its own genesis and actual self-realisation within itself as in a sort of “conceptual heaven” [*Begriffshimmel*], complete and sufficient in and of itself. The building of its conceptual framework is done by a new branch of scholarship: *Rechtslehre*, which if (and when) having reached whatever level of systemic self-formulation was attainable, can then naturally go on to attempt to do an investigation into the branches as well.²³

²² Cf., by the author, ‘Az ellentmondás természete’ [The nature of contradictions, 1989] in his *Útkeresés Kísérletek – kéziratban* [Searching for a path: unpublished essays] (Budapest: Szent István Társulat 2001), pp. 138–139 [Jogfilozófiák].

²³ The concept of *Rechts|lehre* is derivative of *iuris|prudentia*, presuming transformation by scholars, whereby law, the conceptual phenomenon, turns into scholarship, with a concept-set created according to some scientific ideal. On its turn, the doctrinal study of law is derivative of the law posited: it is *meta*-order thereof.

Scholarship disposes of its own procedure of verification/falsification, freed of interventions. In contrast, the doctrinal study of law is *parasitic* a form. As a higher level reformulation of the law with implements of logic and the requirements of systemisation, it takes into account the law’s contexture as well, and as a *reflex*-phenomenon in a *meta*-reconstruction of the law, it is reformulated continuously in harmony with all finite (mentally fixed) states of the law.

If it is true that by one fell stroke of the legislator’s pen, whole libraries are vulnerable to be rendered out-of-date [as formulated by Julius H. von Kirchmann in his *Die Wertlosigkeit der Jurisprudenz als Wissenschaft* (Heidelberg: Manutius 1848), striking the peak of legal positivism: „Drei Worte des Gesetzgebers, und ganze Bibliotheken werden zur Makulatur”]—as recently happened with Quebec’s *Code civil*, when shortly after its enormous doctrinal processing had finally

We need not simply reiterate that wherever law is posited in a continental sense, this involves the parallel birth and reciprocal coexistence of its doctrinal study, but moreover we need to point as far as claiming that in our arrangements dogmatics provides the interpretive context of and for the law posited. By the way, this automatically renders the question illogical whether or not dogmatics itself may have any mandatory force. Obviously, it has none. Yet one still may not step forward with radically new legal understandings in hope of success, expecting far more than flat rejection. (Our life follows this tradition. Its understanding and following in practice secure our life the necessary bounds, like river banks hold the flow of water. Even our freedom is contextualised by it, directing our actions into ready-made or self-reforming channels. In contrast with the Anglo-Saxon mentality, which guarantees the sense of constancy in an ever-evolving world without any superstructure erected. In law, the latter rather achieves consistency directly, by way of relying on the cross-referential use of judicial discourse in argumentation and justification.)

Moreover, although it is one single given corpus of the laws upon which a dogmatics is elevated, doctrinal studies continuously develop in time with competing strands (directions or variations) according to authors. In choosing amongst concurrent variants one may naturally use whatever criteria (including the one used to rank scientific explanations), the final criterion is however always provided by willful decision within the canon of institutional discipline,²⁴ harmonising restitutive conservatism and the renewal's practical intents.

been completed spanning a period of some 150 years [*Quebec Civil Law* An Introduction to Quebec Private Law, ed. John E. C. Brierley & Roderick A. Macdonald (Toronto: Edmond Montgomery Publications Ltd. 1993) lviii + 728 pp.], it rapidly became obsolete with the enactment of a new code replacing it—, then this can only target legal dogmatics, even if cultivated under the aegis of and by means of scholarship, just as this mostly happened with countries (in the 19th century exegetic nations-centered upswing) that had already completed their law codification process.

²⁴ For instance, the disciplinary entitlements of the Teaching Church, including the option to declare anyone a heretic and the institution of censorship as well; or, in a special area of law, those preference-orders that are non-official but are definitely to be taken into consideration, and which are to function in both basic examinations and higher level court procedures in countries rich in literature comprised of competing works in the doctrinal study of law [*Rechtskommentaren*] (especially Germany).

5. Rules and Principles in Law

We spoke above of the manifestation of law being posited in general, because this is the pattern in continental Europe to become—slowly but systematically—the foundation for law to be manifested as sets of rules. To be rule-based is one of the feasible directions of development, rather self-evident by the way, knowing, from the past, the developmental trends of *scientia* in general and of *theologia* in particular, knowing logical reasoning based on systemic conceptual constructs, and knowing how much idealised the use of axiomatic patterns was in history.

Being rule-based, however, has never been exclusive, although to this day it persistently remains the basic form of posited law. The circumstance that principle-based and individual equity-based methods of decision making appear to be competing directions in our time, is just a sign of tactics (in a historical context then: signaling the trend of daily battles) of a struggle for supremacy, i.e., of how to achieve primacy; since it activates an already available potential in order to use it for constructing while de-constructing, according to those *desiderata* within its reach. Its elements had been known since the earliest of ancient times: reference to values, clauses marking community contents of common good and interest and public safety, adjudication according to consequence or derived from undefinedly flexible legal concepts. This new development working to loosen the positivity of law (as signaled by the worldwide effect of DWORKIN²⁵) is nevertheless almost completely irrelevant from the point of view of dogmatics.

Because as soon as law is fundamentally rule-based, even competing perspectives signal the existence of rules, or the presence of the mandate to apply given rules in given situations. Moreover, even the integration of such competing perspectives into the underlying system is mostly mediated by the construction of critical gaps of rules—only to develop their own mediatory forms, from being case-specific (and therefore incidental and feeble) to gradually becoming defined as quasi-rules themselves. Consequently, even the logic behind their dogmatics has no other target than to advance their own genuine or quasi rule-set to a higher developmental level in this way (Rule Set₁ converted into Rule Set₂, and thereby creating a construct valid for use in whatever given present time). Or, all their verbal attacking or mode of phrasing aims to form a canon diversifying Rule Set₂ from Rule

²⁵ See in particular Ronald M. Dworkin 'Hart's Postscript and the Character of Political Philosophy' *Oxford Journal of Legal Studies* 24 (2004) 1, pp. 1–37.

Set₁, but in the perspective of some Rule Set_x (the targeted—albeit always temporary—result of such tactical procedures).

Accordingly, the dogmatics of current mainstreams is exactly neither of a new type nor one offering alternatives. It is perhaps its radical style reminiscent of battle alarm that makes it at first glance unusual (just as the truly brutal *ad hominem* arguments of FRIEDRICH ENGELS or VLADIMIR ILYICH LENIN²⁶ did not change philosophising at their time, at most they signaled its instrumentalised use as an available tool of class-struggle). Since it remains a common element that in law the *termini of decisions are eventually determined by the law itself*—even if the law does not define anything further in specification. Unless—in terms of procedural options—it turns to the alternative of appointing an outside forum of arbitration, it does not even turn over the territory to other materialities (homogeneities) contrasted to its own “distinctively legal”²⁷ one. Even its potentially undefined nature is no other than that of the determined undetermined [*bestimmte Unbestimmtheit*] described by LUKÁCS,²⁸ the filling with content of which on the terrain of law is given as an exclusive power to the judge appointed to the case, and paired with appropriate discretion. Therefore, without the false construct of some mechanicity, we cannot even claim a chance that “a legal regulation would be filled with content by non-legal rules of another social sphere”.²⁹

6. Correlation between Legal Cultures and Legal Theories

Our experiences have grown exponentially in the past half century, and especially in the last quarter century. Our theoretical legal thinking has by now gone away beyond the boundaries of the previously deeply entrenched positivist legal thought, and now—founded by the philosophy and methodology of sciences, substantiated by comparative historical, anthropological and sociological investigations, enhanced in problem-sensitivity, with a particular emphasis given on differentiation between separation and concurrence of ontological and epistemological aspects—it is ready to fully under-

²⁶ Cf. Sándor Szabó ‘A lenini stílus a gyakorlatban’ [The Leninist style in practice] *Korunk* [Kolozsvar in Transylvania, now Cluj-Napoca in Romania] (1960) 4, pp. 375–382.

²⁷ Cf. Philip Selznick ‘The Sociology of Law’ in *International Encyclopedia of the Social Sciences* 9, ed. David L. Sills (New York: Macmillan & Free Press 1968), pp. 51 et seq.

²⁸ Georg Lukács *Ästhetik I* (Berlin: Neuwied 1963), p. 720 [Werke 11].

²⁹ Béla Pokol *Jogelmélet* [Legal theory] (Budapest: Századvég 2005) 562 pp. on p. 31.

stand what it could already perceive in germs (of more intuition and hesitation than of scientific categoricity) in the literary products of the debate between formalism and anti-formalism back in the 1960's.³⁰

An internal reorganisation has occurred among the modes of legal reasoning and argumentation in the process of competing for the position of getting accepted as canon, so that the ruling of the law's territory could be reallocated *via* the reassignment of leading positions. In order for this to happen, new legal policies, ideals and ideologies, as well as professional world views (in the sense of *juristische Weltbildern*) were formulated, which can, naturally, one day in the future end up consolidating into (temporarily come to a rest as) a new legal world view, which will be a new balance, establishing a new professional deontology, replacing (or, to be sure, at least sublating) past normativism.³¹

What is constantly implied by the above is the outcome that the chances of a theoretical-methodological reconsideration (once formulated by CHAÏM PERELMAN and MICHEL VILLEY upon the stand of anti-formalism in argumentation) are steadily growing and so does the chance of reaching a more complex answer in hermeneutics. A new element is the English-American consciousness, which for the first time in history responds to the call to investigate the feasible connections among law, language, and logic; and in its haste to quickly come to possess this construct and in the midst of its focus on wanting to rule over the practical development of law, it has started systematic efforts at integrating into its working legal system a mass of new methodological options. While its law is "floating" and practically disappears into a mist,³² its legal professionals have been put in the position of a gladiator and are left to rely solely on the awareness of the solid methodical nature of their procedures.

Our globalisation has caused our theories to converge, yet our law has failed to follow suit. The excitingly complex methodology which is crusted onto the core of a still remarkably non-conceptualised English –

³⁰ For an overview, cf. Joseph Horowitz *Law and Logic A Critical Account of Legal Argument* (New York & Wien: Springer-Verlag 1972) xvi + 213 pp. [Library of Exact Philosophy 8].

³¹ Cf., by the author, *Lectures on the Paradigms of Legal Thinking* (Budapest: Akadémiai Kiadó 1999) vii + 279 pp. [Philosophiae Iuris], especially at para. 6.1. and 'What is to Come after Legal Positivism is Over? Debates Revolving around the Topic of »The Judicial Establishment of Facts«' in *Theorie des Rechts und der Gesellschaft* Festschrift für Werner Krawietz zum 70. Geburtstag, hrsg. Manuel Atienza, Enrico Pattaro, Martin Schulte, Boris Topornin & Dieter Wyduckel (Berlin: Duncker & Humblot 2003), pp. 657–676.

³² Cf. Varga 'Legal Traditions?' [note 12].

American legal corpus of a merely denotative function has slowly started to dissolve the body of Continental law, which has for centuries been extremely conceptualised and enclosed by the walls of an axiomatic systemic discipline. And what is an unusual cultural intermixture and interflow produced by a comedy of errors from a comparatist's perspective observing from a point far off in the distance, is in this very context a remarkably likeable and almost ideal study target for a thinker using cognitive mechanisms geared toward a methodic and paradigmatic reconstructive approach. All this is now given added importance—beyond the currently forming global-village dimension—by the issue of the convergence trend, present within the increasingly homogenised legal domains currently fought for in our unifying Europe, with former diverging traditions turned into interaction between Civil Law and Common Law, as observed in part in their daily interfacing and in part in their common foundations, their functioning and increasingly more conscious cultivation, on common platforms, fora and discourses.

7. Theoretical and Socio-philosophical Perspectives

It appears that the understanding reached in the HEGELian “cunning of reason”³³ (which suspects both a conscious and an unaware force at work in the shaping of the world, expressed by the MARXian paradox in that “they do not know it but they do it”³⁴) has been serving as one of the explanatory principles of the development of science.

We know from linguistics that specialised languages making use of jargons even on the most homogenised fields are rooted in general language usage, and wherever they reach a boundary they borrow from the latter. Despite the theoretical universality and self-sufficient validity of its logical-mathematical toolset, the effort to construct the pure and unified language of science has failed.³⁵ As mentioned already,³⁶ linguistically speaking law is law, not reducible to anything other, so it cannot be substi-

³³ „List of *Vernunft*” in Georg Wilhelm Friedrich Hegel *Lectures on the Philosophy of History* Section II (2), § 36 in <<http://www.marxists.org/reference/archive/hegel/works/hi/history3.htm#036>>.

³⁴ „Sie wissen es nicht aber sie tun es.” in Karl Marx *Das Kapital* I in Marx & Engels *Werke* 23, p. 88.

³⁵ See, e.g., ‘Gottlob Frege’ in <<http://plato.stanford.edu/entries/frege/>> and the reference to *unified science* in note 4.

³⁶ Under note 1.

tuted with any other statement concerning the law. Consequently, anything built on the law is at a *meta*-level in relation to it. But as also concluded then, parallel to the law (that can be referenced with ultimate validity) three further law-related homogeneities are built on everyday heterogeneity through complicated and uninterruptible (inseparable) interrelations as to their respective languages:

ordinary language

language of <i>law</i>	language of the <i>practice of law</i>
language of the <i>doctrinal study of law</i>	language of the <i>science of law</i>

ordinary language

Relative to the law, the practice of law is at a *meta*-level similarly to how it works in validity references, while it is also an ascertainable fact that the authoritative practicing of the law is capable of overwriting that what it claims only to apply. The doctrinal study of law is in a similar position, and the science of law—so to speak—observes all this from a distance. All of these four components, on the one hand, exert effects on one another, while on the other hand, all they are floating in the medium of ordinary language as stimulating it and stimulated by it at the same time.

Well, if it is true that on the foundation stretching from ordinary language to the language of jurisprudence there are four, partly and relatively separated (because constantly self-rehomogenising) levels of *meta*-systems, then—even if this is valid only for an intellectual reconstruction in language-based symbolisation—this allows the suggestion of some sorts of differing “modes of existence” of the legal phenomenon with “socio-ontological differences” as systemic counterparts.³⁷

I have long entertained the thought of proposing the existence of competing components of law.³⁸ And *voilà*, here we are faced with the law’s in-

³⁷ E.g., a sociologist—Ingo Schulz-Schaeffer ‘Rechtsdogmatik als Gegenstand der Rechtssoziologie’ *Zeitschrift für Rechtssoziologie* 25 (2004) 2, pp. 141–174—recognises (p. 141) that “Established rules of interpreting the codified law have their part in constituting the social reality of law—provided that they are observed by the courts.”

³⁸ Cf., by the author, ‘Anthropological Jurisprudence? Leopold Pospisil and the Comparative Study of Legal Cultures’ in *Law in East and West* On the Occasion of the 30th Anniversary of the Institute of Comparative Law, Waseda University, ed. Institute of Comparative Law, Wase-

timidating complexity, hardly supportable social weight, and the total web of intermediaries³⁹ of being legally disciplined and socially standardised, which are continuously reproduced and managed by largely separated blocks in the sector assigned to law by the division of labour within society. Well, some keenly exact sensitive conclusions⁴⁰ resulting from considerations just surfaced allow the possibility for the law's socio-ontology to further develop its foundations, known from LUKÁCS and NIKLAS LUHMANN, among others.

What are exactly legal professionals doing in a complex society when receiving a large heap of texts in order to be used as a basis of referencing in their practical decision making? What kind of understanding legal professionals form when with firmly established doctrinal understanding in the background, they define meanings able to be presented as premises of decisions made according to their particular hierarchy-expectations and practical testing?

It is to be known that sectors separated (though working together) in the social division of labour while also separated from one another (though working together) are to produce and incessantly reproduce a framework of understanding, which despite forming from the incidents of everyday practice, nevertheless is to reflect determinations manifest in it, creating such a web which is although not independent of all active forces in the given sphere but as a concentrate of them it too steps forward as an intermediary medium, and as such will to a great extent be-

da University (Tokyo: Waseda University Press 1988), pp. 265–285 {& 'Law', or 'More or Less Legal?' *Acta Juridica Hungarica* 34 (1992) 3–4, pp. 139–146} as well as his *Lectures...* [note 31], para. 6.1. For another attempt, see Béla Pokol *The Concept of Law The Multi-layered Legal System* (Budapest: Rejtjel 2001) 152 pp.

³⁹ 'Vermittlung' in George Lukács' posthumous *Zur Ontologie des gesellschaftlichen Seins* [The Ontology of Social Being]. Cf., by the author, *The Place of Law in Lukács' World Concept* (Budapest: Akadémiai Kiadó 1985; reprint 1993) 193 pp., especially para. 5.1.3., pp. 107 et seq.

⁴⁰ To quote but one example from Mátyás Bódi 'Jogdogmatika és jogtudomány' [Legal dogmatics and legal science] and 'A jogdogmatika tág és szűk fogalma' [The large and narrow notions of legal dogmatics] in *Jogdogmatika és jogelmélet* [Legal dogmatics and legal theory] ed. Miklós Szabó (Miskolc: Bibor Kiadó 2007), pp. 32–33, respectively 255–256 [Prudentia Iuris 26]:

"all particular areas of action (practices) have a correlative verbal activity attached, through which an efficiently practice-oriented communication can take place among participants. The key to this is the conceptual set of language rendering the interrelation prevailing between signs and meanings in language to accord to mental correlations corresponding to those modes of action which are relevant to the said practice. In this very sense all social practices have such a conceptual system which may quite reasonably be termed dogmatics."

come independent of all the particular definitions. Furthermore, it will step forward as such a factor—a *second reality*—produced by man based on hierarchical structures originally imbedded in reality, which has a distinct chance to effectively direct the law's understanding into its proper artificial channels and preestablished groupings. And this way—making use of fundamentally educational and socialisation-generating instruments—it can finally manufacture a certain practical sense of human security (in all sectors being disciplined and standardised) out of something that had in and of itself ever been a silent sign: out of language used by law, out of the way language conveys law in given forms.

Or, so far we have talked about dogmatics as the contextualising grouping of the further definition of the intellectual environment of one possible determination of legal mediation, which is positivation. Thus we have contemplated the issue from a single perspective, on the path of the chances of the formally posited law's further formalisation. Therefore we must be cognisant that when doing so, we are giving preference to analytical requirements, and are quite a long distance away from gaining an understanding of the law's social aspects, of the nature of its truly sociological existence, and even farther away from being able to get insight into the law's mystery in its true complexity.

What really takes place here is hardly other than us projecting, distanced by materialising (as alienated into reified objectivities)—and thereby transferring into the fetishised role of a pseudo-deity or substitute sense of security—that which is in fact us ourselves. Instead of the autopoietic reliability of human practice self-reproducing at a societal level, we transpose our desire for safety into conceptualised constructs, into logic and taxonomy, and with this ultimately, in a metaphysical dimension. Thereby we can hardly go beyond what has already been described by FRANK as a psychoanalytical projection,⁴¹ fulfilling the needs of our most human and therefore quite ineradicable innate atavism that will transpose our want for authority in a farther complex into the enchantment by artificial creatures we are stressed at incessantly and instantly producing. This, even if considered in the sense of scientific reconstruction to be the demystification of an idol, is at the same time, however—and exactly in its own duality⁴²—a necessity. This is exactly

⁴¹ Cf. Jerome Frank *Law and the Modern Mind* [1930] (Garden City, New York: Doubleday Anchor 1963) xxxv + 404 pp.

⁴² Referring here to the deeply socio-philosophical debates regarding what the role and the genuine ontological status of ideologies are.

the reason why law was at all formed, since exactly such and similar kinds of reasons led to humanity constructing so called *second nature* to surround itself with, exemplified, among others, by doctrines.

II. INQUIRY INTO THE NATURE OF THE DOCTRINAL STUDIES IN LAW

a) Legal Dogmatics

Attributing scientific nature to the doctrinal study of law as proposed widely is obviously a rather sympathetic effort, as it signals both professional thoroughness and the intent (worthy at times of respect) of giving credit to the creative effort and output of generations in forming the overall professional attitude of following generations. However, it fundamentally misses the target, first of all because although the theoretically possible separation of *theoria* and *praxis* does not propose the negation of their mutual interaction or their reciprocal conception, nevertheless, their fundamental driving forces and related criteria make them separate from one another. Thus, despite the fact that a theoretically motivated reasoning does indeed leave a mark on dogmatics, which does create some derivative original from the law through a methodical process, nevertheless the doctrinal study of law is still fundamentally a *parasite*, since it is no other than an entity *contin-gent* upon the law in force; it is a sort of way of understanding law. This is so because even if the legal stuff is established with thorough and theoretically meticulous preparation, *law* as posited is built merely by the consecutive structuring of words, while *dogmatics* convert positive law into concepts by way of systemic processing, eventually producing some sort of a uniform conceptual system.⁴³

⁴³ It would require a separate research in the future to study what potential analogies may exist on the one hand to theology, but on the other hand for example to literary scholarship focused on text- (etc.) based interpretation. Since we presume the subject of *theology* to be an existing entity, while due to its transcendental nature it is inaccessible for whatever scientific faculty; and the subject of interpretation itself by *literary scholarship* that builds mental *meta*-constructions over literary works is a certain—specific—virtuality. We may then wonder whether this sort of interpretation qualifies as science, and if so in what sense and with what additional conditions; if *art criticism* can potentially converge (and to what extent) with that which is accepted as scientific cognition, and so on.

By the same token, however, the potential implied by dogmatics is not of a material or objective nature, and cannot be described by the polarity of true and false; at least not in the sense that it would describe independently existing (prevailing, etc.) entities. Similarly to when I once already encountered a key methodological problem when attempting to establish the universal historical description of codification: how can we describe various phenomena under the umbrella of a common concept that have perhaps never been even connected in their historical particularity or with regard to the particular function they fulfilled, and are enveloped by functional analogies provided by us doing analysis later in time;⁴⁴ and I was forced to come to the conclusion in the process of mapping legal systems, that in the process of classification whatever only we perceive as a unit, we query not that which is classified, but in fact ourselves and our own perspectives⁴⁵—well, even here our procedure is not of MENDELEJEV,⁴⁶ or BREHM,⁴⁷ or LINNÉ.⁴⁸ We do not simply carry out intellectual procedures on entities existing independent of us, instead we construct on the pretext of something. Since we connect under the umbrella of a single conceptuality *autochtoneous* phenomena and operations—certain kinds of social order-ideals and order-establishing institutions chosen by us for our own purpose—otherwise independent of one another, so that we could once again draw distinctions among them, creating sub-groupings under the pretext of classification. Consequently—essentially—by conceptualising, we are creating;⁴⁹ because by the act of conceptualisation (in whatever way) our perceived subject of knowledge is at once changed. So, to return to our topical issue, this is partly why there is a battle in progress among the players in the vast institutional field of law, regarding which agency (justice branch of the government, judicial forums, legal professional associations, *academia* or *universitas*, or in the case of competing institutions: which one of these) is to rule over legal dogmatics.

⁴⁴ Cf., by the author, *Codification as a Socio-historical Phenomenon* (Budapest: Akadémiai Kiadó 1991) viii + 391 pp.

⁴⁵ Cf., by the author, 'Taxonomy of Law and Legal Mapping: Patterns and Limits of the Classification of Legal Systems' *Acta Juridica Hungarica* 51 (2010) 4, pp. 253–272 {& <<http://akademiai.om.hu/content/9u2w571071085670/fulltext.pdf>>} as well as in *The Romanian Journal of Comparative Law* I (2010) 1, pp. 105–133 {abstract: <<http://www.rjcl.ro/en/articole-revista/276>>}.

⁴⁶ Cf. <http://nl.wikipedia.org/wiki/Dmitri_Mendelejev>.

⁴⁷ Cf. <http://en.wikipedia.org/wiki/Alfred_Brehm>.

⁴⁸ Cf. <http://en.wikipedia.org/wiki/Carl_Linnaeus>.

⁴⁹ Cf., by the author, *Lectures...* [note 31], in particular in para 2.3 on pp. 61 et seq.

As we could see earlier, logic resides not in things or events, and not even in texts, but in the intermediate relations of theoretical propositions prepared for the exclusive purpose of providing the foundation for the establishing of logical connections. Thus it does not “reveal” itself, similarly how this logic is not even “discoverable”, as the normative text itself does not contain or carry it. The person involved in the doctrinal study of law at best reconstructs and also conceptually formulates—with the toolset of logic, linguistic and so on—the systemic idea, which could have—at least intuitively—governed the thinking of those who had drafted the law, or whatever could be deciphered, with a certain sense of optimality, from the given text in the process of analysing it, with the express purpose of just such a doctrine-establishing effort. Consequently, at all times and in all cases it is an authored product, even if it is mostly often produced in what is practically a historical chain of authoring, similarly to how a folk song or folk ballad takes shape with the sequential involvement of multiple players, like griots. Its novelty factor is in its lending logicity to what is indeterminate and inadvertent. But due to the fact that this is only a quasi-theoretical reconstruction, which then provides added meaning and logically added content to the subject that does not in its own right carry this content and meaning, theoretically it too is contingent: it can have multiple outcomes coded into it and it can (or will) lead to its variations competing with one another. Its practical goal is obviously to establish the foundation of the continental ideal, that is the one of results in consequentiality, with deductions derived from what had previously been posited as law in order to create the possibility of certainty in the law.

b) Non-conceptualised Traditions in Law

In legal environments where the conceptualisation of law itself has not yet occurred, we can speak of no doctrinal study in a strict sense. As known, the continental tradition did not merely involve the retracing of *ius* to *lex*, i.e., the connecting of the legal quality to an authoritative positing. It also included the expectation of being embodied by a text, which is more than simple objectification. This instead is the taking into account that whatever is even considered law does in fact reside in the body of a text, consequently, it can only be derived from it, however, it is strictly to be derived from it with straight logical clarity. And as an adequate form, this provided the foundation for *mos geometricus* in the late Middle Ages and early

Modern Times. Well, no cultural system other than the so-called Continental entrusted the evaluation of its ethical matters and the human capacity's most sensitive and most transcendental aspects—i.e., ones pointing toward final (and therefore non-provable by its reconstructive element) goals—to the abstract mechanistic method of a formal schematism.

As opposed to the domain of Civil Law (where the construction of concepts is based on the doctrinal study process applied to the words of the legislator contained in a closed notional system), in the case of Common Law (regardless of the existence of a large mass of perhaps even higher level scholarly processing that historically subjected it to analysis) all this reasoning present in legal practice and legal scholarship is only manifested in a historical context as constructs, produced by the sequential ordering of past judicial deliberations (in argumentation and justification) placed on a layer above whatever reason and potentially discoverable conclusion that can be drawn at any consecutive (present) time. Classic Anglo-Saxon law, despite having done some sorting, typification, and having demonstrated other ways of gravitating towards some sort of conceptualisation, has not done this with the intent to reestablish itself in a conceptualised form; and especially not in order to transform itself according to the Continental model by way of exchanging the chaotic character of its law (i.e., the mass of prior decisions having accumulated over the course of its history that can be used for reference as precedents) and the random organisational construct thereof for another systemic model based on the modern codification ideal, and thereby close the past and leave its former open structural model behind. Whereas wherever this embodiment has not appeared, no dogmatics exists.

Consequently, even analytical jurisprudence is not *Begriffsjurisprudenz*, because it has a different ethos, and accordingly it has a dissimilar subject and mission as well. The former is a product of the revolt against historical jurisprudence; it is the transferring of ethical formalism (that had otherwise and for other reasons taken root on the British Isles) and of the hypothesising conceptual analytical approach to the domain of law and jurisprudence. Its concepts are constructed, they are akin to working hypotheses, and having been started with the phrase “let us suppose that...”, they are only valid within the framework of the given argument. They play the role of substitute reality in a mental exercise, which at best only attempts to model a certain representation of reality in the light of its own distant methodological understanding, but in no way does it try to replace it. It is only able to function by *characterising*, that is, it is only appropriate for a didactic purpose, for a certain *meta*-operation, and

not for description. This is in contrast with the latter, the late 19th century German idealising version, which having treated the law's logically reconstructed form, its intellectually sophisticated representation and systemically complete conceptualisation granted as its natural (cognitive? hermeneutical?) environment (or representing the law in action advancing the factual social content and sociological attributes of law in books), attempts to construct a fundament (in the name of a clear scientific abstracting process) underneath it and behind it, which is then and from that point on considered to have been built with the purity of a completely theoretical approach. Therefore, not even *Begriffsjurisprudenz* can be considered a branch of science in the same sense as the understanding we have of the character, for example, of the history of law, or the philosophy of law as social theory disciplines, since it does not operate with historically *hic et nunc* given real phenomena. Its characteristic abstract generality, nevertheless, is just such a framework, the generation of which is also currently being attempted by analytical jurisprudence with increasingly more determination, and these days with increasingly more deserved success.

Due to its conceptually modeled nature, dogmatics does not have authority, since it gets its clout and esteem from a different source: specifically, the sheer fact that it cannot be ignored. Since as soon as it comes to being, even in whatever premature form, it starts to exert an impact, because by default it limits our comprehension and human *imaginatio* serving as the foundation thereof and the key to it, and as such it redirects our thinking into its own channel. It is exchangeable, of course, freely, but only with something superior. The same thing is happening here what we observe with the battle amongst theories, the competition of possible worldviews: of these, only those few can succeed in progressing beyond its predecessors, which can deliver a more complete conceptuality using fewer principles as starting points, while its relevant answers provide the most optimal solutions coupled with leaving the smallest vulnerable surface exposed and having to be defended.⁵⁰ So the authority of dogmatics is similar to that of the so-called invisible constitution (which, in its original and single acceptable meaning, was referred to as an entity prevailing in constant formation in the early period of Hungarian Constitutional Court practice):⁵¹ it comes from the fact that it cannot be ignored or confronted with success exactly because of the

⁵⁰ In terms of its classical criteria, cf. Varga *Lectures...* [note 31], especially in para 2.2 on p. 37.

⁵¹ Cf. note 8.

fact of its very existence; it is no match for anything but another, more convincing version of itself constructed with the power of an even more intellectually sophisticated mental process.

In its classic form, Common Law only presupposes the existence of a rule in the methodological process of developing a specific judicial ruling, which it does not, however, disclose *expressis verbis*, and thus Common Law leaves the case-specific answer arrived at open (in the way it is verbally formulated) for further interpretation in the future by a judge opting to use it as precedent. Departing from whatever rule is understood to be at work governing the internal judicial mechanism of the particular case being used as precedent by a later judge adjudicating his given case: the option of either *distinguishing* or *overruling* is open. Consequently, the judge cannot access, control or change whatever rule as merely perceived to be at the heart of the precedent case, when he or she “distinguishes”, because the very term *distinguishing* is being used by the jurist descriptively and in a symbolic sense, in order to consciously establish that in the case of *distinguishing* he or she does not see fit the use of whatever prior case as precedent in his or her adjudication of the case underway; and in the case of *overruling* the judge decides to fully reject—from that point on into the future—some prior finding, in the sense that he or she rejects whatever hypothetical conclusion that would necessarily or desirably result from applying the logic of the prior case, considering that the subsequent judge is even capable of reconstructing the precedent case to a greater or lesser extent, in order to be able to formulate the hypothetical decision the preceding jurist would arrive at in the subsequent case. (As we could observe earlier, in contrast with the relative historical changeless nature of continental Civil Law, Common Law shows signs of significant change—a reconstitution with an entirely different character—practically every one hundred years.⁵² Therefore, it is not completely contradictory when these days we quite correctly happen to discover even virtual rule-type elements in the practice of the US Supreme Court.) In contrast with this tradition, Civil Law is rule-based manifestly and with an expectation of virtual exclusivity:⁵³ this is what is posited, and what will be

⁵² Cf. Varga ‘Legal Traditions?’ [note 12].

⁵³ It is of symbolic significance that in Continental law the principles, clauses, flexible or vague legal concepts have always been positioned in either the generality (which—so to speak—has a scope that goes beyond posited law) of the founding, or on the periphery; in the first case, barely reaching the benchmark of being specifically legal in nature, and in the latter, as an error quotient that is yet to be tolerated.

converted logically into norm by way of being subjected to doctrinal processing through abstraction.

It is exactly the transformational potential embedded in logical formalism that represents the added advantage of *d o g m a t i c s*: the ascribing of a new quality to the old. Consequently, the doctrinal study of law does not so much “reflect” than lends a certain structure, and with it a certain sense of confirmed (secured) meaning and connotation, and with these the notion of order and the state of being organised, and, in turn, the necessity of consequentiality. Its formalising and logically-constructing predeterminate fundamental nature is signaled by the fact that it tends to postulate rules even in places where there are none—since it fills all the available space to its capacity due to its systematically structured nature, even if that space is otherwise sparsely occupied. Something similar happened at the time of the Roman law’s reception, since the doctrinal study of law starts off, and is in fact built, with whatever is available; and because one of its tools is *g e n e r a l i s a t i o n* and the other is *e x t r a p o l a t i o n*, therefore it is capable of producing something perfect and finalised out of anything, providing a logical construct that is an appropriately secure foundation for the superstructure that is the desired answer to the particular question. This is self evident, since what the doctrinal study of law does from an operational perspective is the interconnecting of parts, the promotion of certain ones to the level of abstract theoretical generality (thereby ascribing axiomatic definitive power), all the while generating a theoretical framework around them, in order to present given positive rules as, e.g., subcategories, exemplifiers, or potentials of others.⁵⁴ Consequently, dogmatics can exhibit a structural pattern of concentric circles that can be widened potentially around the core of the positive text, and these circles can temporarily be more or less frozen in any particular state by the forces of conventionalisation, while the system is theoretically always reconstructed each time, and through internal tension, as a result of any change (that occurs with respect to the positive component or the nature of the particular conventionalising approach being used).

Accordingly, to the extent that European Middle Ages and Modern Times approached the Roman law’s perceived logical perfection with enchanted reverence, by the same token it in fact ended up manufacturing this construct of perfection. (And in more recent times, it is the English–American legal world with its experiential character that has taken over in

⁵⁴ Cf. Varga ‘The Quest for Formalism...’ [notes 3] and ‘Structures...’ [note 5].

this role from its Latin and Germanic predecessors, and in doing so *it* then appropriated—reinterpreted according to its own existing principles—the very same inheritance: using the same original raw materials it is now magically producing a loose chain of multiple *casuses* and correlation thereof based merely on argumentation.) The issue is quite similar to that described some decades ago with regard to the problematics of codification observed in the United Kingdom, South Africa, or for that matter Israel.⁵⁵ Specifically, we have historically layered tradition (comprised of tiers built up in sequential stages, one on top of another over time) that is rather chaotic, and is open to various modes of actualisation with even odds, and the arbitrary codification of this tradition does not merely provide a logical shell, but it also de-forms in comparison with the original state, causing the law itself, its understanding, and naturally the methodological approach thereof to undergo a change in character. This is why other traditions stopped short of a full replacement through their own codification, and chose instead various substitute processes to fulfil this need (such as the English *text-book writing*, the American *reestablishment*, and from the Middle Ages to today by way of didactic, doctrinal, or private-codification treatises and works).

Obviously, we cannot pretend as though the two possible components of a polarised reality could only be the law already conceptualised in a doctrinal systemic construct on the one hand, and the disorganised version thereof, stuck in its original state of chaos on the other. In addition to a doctrinal function we can naturally speak of the operation of *d o c t r i n e - s u b - s t i t u t e* functions and functioning as well, similarly to how in the case of an otherwise floating Anglo-Saxon law⁵⁶ the loose groupings established within case-law can in fact have an organisational effect creating a temporary order.

c) The Stand of Law and of its Dogmatics

In the process of my development as a thinker I arrived at the broad understanding described above based on two consecutive realisations. The methodological dilemma I already remarked upon, which manifested in the

⁵⁵ Cf. Varga ‘Legal Traditions?’ [note 12].

⁵⁶ For its characterisation as “a rule of thumb”, cf. Frederick Schauer ‘Is the Common Law Law?’ *California Law Review* 77 (1989) 2, pp. 455–471, quotation on p. 467.

tension that appeared to exist between the varied nature of the subject of investigation on the one hand and the artificial nature of the drafting thereof into the sphere of one conceptualised group uniformity on the other was resolved for the first time during my research on GEORGE LUKÁCS,⁵⁷ when I came to the definite conclusion that the appearance and presence of our social matters in our consciousness and their intellectual processing have a straightforwardly ontological significance; and the second such instance of discovery was related to my inquiry into the judicial process,⁵⁸ where I came to understand that even our epistemologically relevant entities we refer to in legal contexts are artificial human constructs built in the praxis as channeled by our conventionalised social institutions in a way that may quite be contingent as compared to the underlying nature of the things involved.

If we examine all this in a more broadly defined historical context, in the light of the new developments of the past few decades, then naturally we can find additional points of reference. First and foremost, it is worth mentioning again the 1960's debate taking place between formalism and antiformalism, which treated the describable nature of the legal process in such a way that it strives to arrive at a final *descriptio*, within which it may attempt to establish criteria. In other words, first MICHEL VILLEY and in his footsteps CHAÏM PERELMAN also described something actually occurring, and essentially recounted (and thereby confirmed the presence of) characteristics integral to the process, ones that had been contained therein throughout. To the contrary, we may state that DWORKIN's steadfast conviction with a practically worldwide revelatory effect did not just describe something, but in fact ended up launching a new movement, an encouragement of commitment to a certain deliberateness. It is worth knowing with regard to the latter, however, that the acts of disconnecting or releasing, revolting, and repudiations (as the mental equivalents of *deconstructio* and *destructio*) do not tend to lead to a permanent revolution, rather to the relative widening of the framework of thinking, the broadening of the scope of the paradigms that had previously been accepted as foundation, including the redefinition thereof with a broader perspective. This is what happened here as well, to the extent that this led to a renewed *constructio*. So it is possible to state with a theoretical edge that: if and insofar as PERELMAN, DWORKIN or someone else constructed or integrated alternative ways—i.e., a new sec-

⁵⁷ Cf., by the author, *The Place of Law...* [note 39].

⁵⁸ Cf., by the author, *Theory of the Judicial Process* The Establishment of Facts (Budapest: Akadémiai Kiadó 1995) vii + 249 pp. and 'What is to Come...' [note 31], pp. 657–676.

tion, stage, or filter—into the system that had hitherto been perceived as being less particularly defined (i.e., believed to be comprised of fewer elements, units, or features) and treated accordingly, they could indeed assert a force of differentiation, yet the general framework of the structure remained unaffected as their work caused no fundamental change. The same conceptual set generally remained the definitive one into the future; always at the level defined by the needs of the contemporaneously available and prevailing (due to having been developed as such) school of thinking. To put it differently, if and insofar as a certain *Begriffsjurisprudenz* is the foundation of our thinking here on the Continent,⁵⁹ it will become richer—and will possibly lose its status of exclusivity—after having gone through the adventure of facing *Interessen-* and/or *Wertungsjurisprudenz* [the jurisprudence of interests / axiological jurisprudence] in battle, while it still serves as the framework of the whole of our procedures just as it had before.

Our scientific query aimed at law as a subject of knowledge, as an empirical phenomenon, as an existent social particular will inevitably miss its target, since it simply cannot be accessed or reached with any single-angled approach. In the context of our current discussion the only thing we can be certain of is that law in and of itself is not a conceptual phenomenon, more precisely, its conceptualisation (although done in the midst of a largely already existing conceptualising tradition) is the ulterior (and subsequent) product of a strategic (conscious) conceptual system-building effort, which potentially replaces its predecessor. Accordingly, there is a coded duality insofar as the law is, on the one hand, a fundamental given for any given society in any given time, and, on the other hand, it is also a product originating in society and in the combined intellect of its intellectual elite, where it becomes developed further, as it is made to undergo preparations causing it to become available for contextualised, conceptualised operations. That is, there are

something externally given for us	further quality added by us
law	ordering reflection clarifying law: dogmatics, substitutes to dogmatics, doctrine

At the same time, the law in force will at all times function as some sort of a foundation, granted that it is conditional upon whatever its prevailing character is (the ways it is posited and formed, and the nature of the former's con-

⁵⁹ In which the *Dogmengeschichte* is part of *Rechtslehre* if the latter had been developed above the former.

comitant acceptance). To put it differently, the law will function as a foundation according to its particular characteristics, and this serves as a point of departure for the work of daily practice, which always develops it further in order to arrive at answers to be found in it and by it: optimal solutions to everyday challenges and to peculiar issues contained therein, resolutions that are at the same time in accordance with their own concurrent needs. Accordingly, the law is always present in social practice as an entity that is at once originally transformed and is to be transformed. That is, it is something

something externally given for us	practicability added by us
law take as “strict”	loosening/tightening / incitation / enlivenment take as “actualised”

which maintains the duality (separated here for the exclusive sake of this conceptual analysis) at all times—even if we are not always cognisant of it throughout our rather simplifying everyday word usage (as that tends to treat them as a single combined entity).

Such dualities (which we could produce an almost infinite list of) tend to result in the starting of processes (games) within practical social existence (which is, above all, institutionally represented as effectuated by speech-acts that are, on the one hand, always channeled and are therefore seriously disciplined and are checked and rechecked in multiple ways, and on the other hand and at the same time are, nevertheless, theoretically still open-ended, because they are of undetermined odds). Consequently, we may also state that our doctrinal taxonomies may become reality; similarly to how we may also state that all kinds of alternate realities may be produced out of our single doctrinal taxonomy, as their supposed institutional realisation.⁶⁰

III. ‘LAW’, ‘SCIENCE OF LAW’ AND ‘SCIENCE’

After having clarified my theoretical outlines to the extent possible, it is an honour for me undertake the task of (1) testing them against the critical re-

⁶⁰ Although the following is an ironic observation, yet we must come to the conclusion that had the contemporaneous social theory been cognisant of this extensive creating power of language, then in the so-called linguistics debate—e.g., G. F. Aleksandrov *I.V. Sztálin »Marxizmus*

marks voiced by my three commentators (who presented them in a rather fully developed state and with their own independent perspectives), and I will attempt to synthesise all of these, then that of (2) wording a reminder of a social-philosophical significance.

1. Critical Positions

a) Ad Mátyás Bódig 'Doctrinal Study of Law and Jurisprudence'

The critical positions established in opposition to my train of thought mostly challenge it either from an internal standpoint—elucidating weaknesses in either the foundation or the logic of the argument—or from (what is more akin to a merely signaled, rather than a fully developed) external (competing) position. But to the extent that the latter involves the process of transferring basic concepts from their original environment of the system being criticised into the mix of their own concept-clusters resting on a different trend of thought and philosophical exposition, in such a way that they simply establish equivalence by way of claiming a direct correspondency between concept-pairs of differing functions and of distinctive provenances of having been formed in distinct concept-units (mostly between conceptual disjunctures), this can certainly generate “reflexive” excitement for the intellect based on their original “pre-reflexivity”, but is, nevertheless, questionable in terms of reasonableness and therefore remains exceptionally problematic.

For example, following from the condition that the subject and the result of the doctrinal study of law, i.e., the text of positive law and the *meta*-level built upon it is perceived by the critic as “the difference between the plain appearance as phenomenal form and a deeper content”,⁶¹ we see the reemergence of

és a nyelvtudomány» című műve és kiváló szerepe a társadalomtudományok fejlődésében [Stalin's work on «Marxism and linguistic» and its contributive role in the development of social sciences] (Uz'horod: Kárpátontúli Könyv- és Folyóiratkiadó 1952) 34 pp. or Earl Browder *Language & War* Letter to a Friend concerning Stalin's Article on Linguistics (Yonkers, New York: 1950) 12 pp.—STALIN would in fact have had more reason exactly to posit language as a superstructural phenomenon, obviously there and then causing thereby even greater destruction, and having the effect of disintegrating all human knowledge accumulated over the eons with tremendous toil. For the background, cf. Piers Grey *Stalin on Linguistics and Other Essays*, ed. Colin McCabe & Victoria Rotschild (New York: Palgrave 2002) xiv + 267 pp. [Language, Discourse, Society] and, by drawing the perspective as well, Udo Hagedorn *Der Marxismus und die Fragen der Sprachwissenschaft* Die Diskussion der Stalinischen Linguistik-Briefe in der DDR (Münster: Lit 2005) 162 pp. [Politikwissenschaft 101].

⁶¹ Bódig 'Jogdogmatika és jogtudomány' [note 40], p. 28.

the persistent dilemma specific to all our debates concerning law, the resolution of which, it seems, keeps reemerging as a task to be carried out by all successive cultures and generations, despite the fact of its character appearing to suggest that the issue had long been decided. Specifically: whatever it is we talk about in law, we use our own concept of law as the foundation of our reasoning; but because at the same time we tend not to clarify the nature of the supporting theory, most often we tend to go past one another, all the while avoiding real confrontation behind the guise of a verbal disagreement.⁶² Well, in our culture, law is a unattainably unique entity, because it is independent of any materiality/immateriality: as given for us, it owns the exclusive feature of an authoritativeness that is valid and is therefore also formal, which serves as the ultimate and deciding point of reference for any and all argumentation occurring in law. We call upon this in such a normative reference/referencing, which is used freely by all actors according to their individual position and the specific circumstances of their own situation. However, due to the fact that each legal actor is part of a sort of hierarchical *mega*-organisation, which is at the same time characterised by interrelationships, and in which the moderating affects of checks and balances generally work rather effectively; furthermore, in order for the legal actor to increase the chances of this normative referral becoming firmly final in its validity, and hasten its acceptance, well, these legal actors, nevertheless, do indeed fit seamlessly into the commonly accepted tradition, which is mostly made unambiguous by whatever praxis that happens to be operational under the reign of the majority (and especially those positioned higher hierarchically); and that, which is the supposed “deeper content” of this, can indeed be influenced by anyone in any possible way when they utilise it and validate it. Truly, anyone can do this ranging from its strict, narrow, professional sense to an almost symbolic involvement,⁶³ who even does so much as come in contact with and respond to law: in order to understand it or pass judgment on it, or to happen to present it didactically, or perhaps to increase

⁶² Cf., e.g., Alf Ross *Towards a Realistic Jurisprudence A Criticism of the Dualism in Law* (Copenhagen: Mungsgaard 1946) 304 pp. at p. 13, and for the context, by the author, ‘Quelques questions méthodologiques de la formation des concepts en sciences juridiques’ in *Archives de Philosophie du Droit* XVIII (Paris: Sirey 1973), pp. 205–241.

⁶³ See the thought-provoking message contained in the statement, according to which “for example horse breeding too has dogmatics”—Bódog ‘A jogdogmatika tág és szűk fogalma’ [note 40] p. 256—or imagine the possibility of a supposable classic Roman or Anglo-Saxon doctrinal study of law—as done by Györfi Tamás ‘A jog fogalmi rendszere és az indokok dogmatikája’ [The conceptual system of law and the dogmatics of motivations] in *Jogdogmatika...* [note 40], pp. 39–57 at p. 44.

the harmonisation of its application, or in order to increase further the internal coherence of its systemic quality using a line of reasoning that itself has an internal origin.

If I further investigate the concept of law—having to recognise even the postulation according to which we could be faced here with the case of “confirmed practical positions and connected epistemic elements”⁶⁴—then I must come to the conclusion that it does not provide a sufficient description of law, which is valid and is therefore authoritative, if for lack of a better choice (i.e., based on an arbitrary disjunctive proposition, by default) we simply declare it to be the domain of *practical wisdom*, i.e., some sort of *practical knowledge*.

Almost half a century ago, it was in my very first theoretical writing that I attempted to prove that law is a verbally manufactured social tool (in opposition to LENIN’s so-called reflection theory, that is, the theory that claims that law in its verbal form describes reality, and as such is the manufacturer of a cognitive body within the realm of the law’s ontology—and therefore, according to my contemporaneous understanding, precluding by default even the option of any particular and specific jurisprudential nature). So, it is merely technique, built according to a target-oriented cognition, but no longer includes these in its objectified form (as it has already sublimated these: the *Aufhebung* [sublation] implying preservation through cancel and change that already happened)—despite the fact that its verbally expressed form (description as action in declarative mood, and so on) makes it apparently quasi-cognitive.⁶⁵ This then, and no other, is law, which, exactly because of this, cannot be made equal to any statement made about the law (and its content, or message) with regard to its function, or “mood of existence”. Consequently, anything that is not law itself, although speaks of it (even if it repeats/recounts it letter for letter, word for word) in the form of a verbal expression, can only be some sort of a *meta-level*, i.e., a higher tier in relation to law itself.

Well, we know from the developmental description given of children by developmental psychology that the more intense the developing psyche’s interest in “What is this? This is: that? And what is that?”, the more inexhaustible, bottomless, and unending it is. Now, insofar as I have come to the point where I question whether at all we even know what exactly law is, we

⁶⁴ Bódić ‘Jogdogmatika és jogtudomány’ [note 40], p. 40.

⁶⁵ Cf., by the author, ‘A magatartási szabály és az objektív igazság kérdése’ [The rule of behavior and the issue of objective truth] [1964] in his *Útkeresés* [note 22], pp. 4–18.

can quickly arrive at a point where we face the possibility of not being able to define what jurisprudence is either. Since we have already seen how literary “science” itself is not without problems, since as part of the Humanities, literary theory gets close to bona-fide scientific-quality analyses mostly through posing questions within the domain of modern cognitive science. Well, what kind of jurisprudence is it, that is “infiltrated”⁶⁶ by the doctrinal study of law, as a particular “mode”⁶⁷ of the former? And what exactly could it mean that in contrast with the dominance of the “practical mind” at work in “prereflective” dogmatics “reflective” dogmatics is operated by a “theoretical mind”?⁶⁸ It is certainly a fact that any action in law (and about law) is a practical one. But at the same time, whatever additional substance or whatever different existential quality that manifests itself in the doctrinal study of law compared to the law in its own contextual reality is not in any way of a scientific quality; it is at best of a theoretical quality only to the extent that it attempts to establish its own systemic construct with a certain necessary deliberateness and self-imposed requirement of consistency.

In the doctrinal study of law, it is the posited arbitrariness or contingency that fabricates a form for itself, which gains a conceptualised expression in the form of a certain systemic grouping, and thus lends some kind of appearance of necessity to itself. But we must at the same time understand of this form-giving that theoretically it too is subject to chance: a certain kind can crystallise here of given materials, and another kind elsewhere; but whatever form can itself develop into a culture, having taken root and gained strength in the soil of the by and large common social understanding of law: it can become such that it too can lead to the genesis, or become the identifier, of a given culture. And if we refer back to either my understanding of law as a tool, or to the notion that it is a practical product of the jurisperit as a scientist, which in itself is not science, then we can state: if it is a bridge (and so on, in the chain of practical acts of creation) then that is why we should be able to use it, and therefore we make a tool (among others: based on our scientific aptitude), and if law itself is a tool, then in this case its doctrinal study too will be no other than a *meta*-tool, i.e., an auxiliary instrument of a tool. Well, the doctrinal study of law answers the question of what law is about (as a practical declarative assertion made by man, as being formed as a conceptualised *meta*-system, with the

⁶⁶ Bódig ‘Jogdogmatika és jogtudomány’ [note 40], p. 30.

⁶⁷ *Ibid.*, p. 31.

⁶⁸ *Ibid.*, p. 33.

promise of theoretical equivalency, thus *de lege lata*), and in this (because the doctrinal study of law itself is a practical declarative assertion, that is, by evaluating goals and consequences it too is geared to making the practice of law more optimal, and therefore attempts to sneak its own *de lege ferenda* viewpoint into the midst of the established and accepted toolset and methodology of dogmatics to the extent it is tolerable) it is also about the issue of fitting into the question of “What is law about?” the questions of “What could / should law be about?” and “Could it be interpreted in such a way that that would also include »what law is about«?”

And with this—on account of the issues related to ‘law’ and then ‘science of law’—we now have reached the third category contributing to uncertainty, that of the status of science. Since “conceptual constructs d o c r e a t e something as a feature/element of that object which they refer to”.⁶⁹ This is because the subject of science (animate and inanimate nature) obviously d o e s e x i s t, it is dynamical and exerts effects; but these qualities (along with weigh-ness, caus-ality and others), however, are ascribed to it by science’s tendency to conceptualise—simply so that science could describe processes going on in nature. And because by doing so it can test these as intellectual representations, it can prove them in the polar opposite pair of true/false (in the sense of more or less, like this or like that): it arrives at cognition. However, it does not follow from this that “the conceptual constructs [...] not only [...] develop/form our relevant ideas, but [...] itself as well.”⁷⁰ Because it is us ourselves who perceive nature to be richer, more coherent (and so on) with the advance of science—without nature itself in fact becoming or being transformed into something other or different; man’s participation in the shaping of nature can only artificially introduce new factors by wedging them in it, transfer into a new environment, and channel otherwise acting forces into the causal (etc.) chains that can be described as otherwise existing based on occurrences established by science’s (conceptualising) discoveries.

Similarly, the doctrinal study of law may cause changes to occur not in law, but in the understanding of law, or its perception. Since law simply i s, or perhaps somewhat more precisely p r e v a i l s as given, so long as something else is not posited or made in action instead of it. Because law in

⁶⁹ *Ibid.*, p. 36.

⁷⁰ Similarly at Bódig ‘A jogdogmatika tág és szűk fogalma’ [note 40], p. 6: “Taken as an activity, the doctrinal study of law does not so much produce legal dogmatics in the sense of a conceptual system, rather it renews it.”

itself is no more than a set of words that is silent like a rock, until members of society that uses (in other words “understands”) it and creates an environment that enlivens it, start to make it speak on behalf of the culture that integrates them, in order to advance that culture (just as a stone becomes more and different for us than a mere thing on the bank of a stream, only when a toolmaker operator armed with the knowledge of mineralogy and mechanics turns it into a utilitarian object and starts using it). Law itself is definitely not theoretical in nature, and it is neither a direct product of science. Likely, the most appropriate understanding we may develop of law is that it is an embodiment (formulation) of a pattern (or model) to be followed in human praxis, a certain verbally pronounced order-generating and disciplinary directive of human behaviors. Therefore and to this extent it is *p r a c t i c a l* a category; consequently, any statement made regarding its content is not of a cognitive type, rather (disregarding here whatever is added by the conceptualising process and the hardly avoidable effect of significantly furthering its development) it is at best restating, *r e s t a b - l i s h i n g* in nature. This added substance is of course just as influential in forming the current understanding, as it is central in shaping law that is to be posited subsequently in the future on this very same base of contemporary perception.

Statements made regarding this sphere may obviously be tied to “such claims of validity that are based on cognitive elements”.⁷¹ Nevertheless, does it follow from this—and if so, in what sense—that “convictions regarding the »practical applicability« of doctrinal constructs are capable of carrying the truth”, because “they relate to an object of cognition that »exists independently of us«: to the legal process”⁷²? Furthermore, does it also follow that therefore “it treats as objective all statements that are acceptable to all relevant others”, due to the fact that “it can be made free of the eventualities of subjective points of view”⁷³?

Above all, we should be aware that a conceptual construct we invite into our discussions—either as an original construct of our own introduced for analytical purposes, or when adopting one from a classic school of philosophy—can only be used in a sensible manner strictly within its own explicative domain. A disjunctive concept-pair always polarises, mostly naming the polar opposite (positioned as a negation) with the intention of establishing

⁷¹ Bódig ‘Jogdogmatika és jogtudomány’ [note 40], p. 37.

⁷² *Ibid.*, p. 38.

⁷³ *Ibidem.*

a reference that makes the entity to be acknowledged perceptible in the light of contrast; in real life (in the aspects of reality symbolised and represented by the “objects of cognition”), however, diametrically opposed polar positions are rare. Ultimately, there is nothing else in our social environment beyond human practice; it was within this realm that with the advent of methodological cognition our ancestors introduced the dual concept of *scientia* and *praxis*; but with this move they only managed to establish the relative demand and opportunity for independence of scientific postulatory activity, yet they did not at the same time reject the notion that any and all human activity, including practicing science, is rooted in our heterogeneous social existence; just as they did not intend to bar from the scope of everyday (not homogenised, or not homogenised in the sense of *scientia*) human activity the presence of “cognitive elements” that have become (or are potentially adoptable by) what is our common (general) knowledge (made available freely to all). We (can) only speak of degrees, ratios, or at the most the setting of final criteria.

The doctrinal study of law that has been created as an overtone resonating on top of the note that is positive law comprised of a set of rules—is the product of a virtual conceptualisation. It is akin to a mathematical or geometrical system, which can be a differently built system as well designed by free choice if and insofar as it is possible to construct it in a different manner based on its own premises, methodology, and systemic postulation.⁷⁴ As something conceivable or possible, no one variant of it can be made exclusive. At the same time, theoretically any form of it can be inserted into any practice; it is fit for any given normative material, so to speak; since this choice is essentially—in theory, but also in light of historical examples—conditional simply upon appropriate intention (decisive action) and the structure of (political) power; it is merely a question of *volitio*. It was my intention to understand the message contained in positive historical examples some two decades ago that led me to the understanding based on LUKÁCS that law is and has ever been to overlay (or build on) the various homogeneities (religious wars, economic conflicts) providing the impetus and cover for the various heterogeneities of social dynamics and struggles as a “phenomenal form” intended to mediate among partial complexes with an

⁷⁴ The embedding of geometry in contingent human historical experience by ERNST MACH is but one of several examples of the philosophical problematics of the notion of existence. Cf., by the author, *A jogi gondolkodás paradigmái* 2nd ed. rev. & enl. [of the title in note 31] (Budapest: Szent István Társulat 2004) 504 pp. on p. 211.

ordering force through its own specifically homogenised “system of fulfilment”⁷⁵ (which, of course, under given circumstances can become overwhelming as well, and can potentially become the definitive force);⁷⁶ then examining the history of law I recognised just how flexible and uniquely adaptable law-application is by nature, which in turn led me to the theoretically-minded and generalising realisation⁷⁷ that in law the presence of a significant enough practical interest (expectation or need) will inevitably render the theoretical element (consideration) vulnerable or at least make it amenable.⁷⁸ Insofar as law is “capable of carrying the truth”—so to speak—in the above mentioned sense, well that is in fact nothing more than stating with a theoretical spin, that a bridge built with certain materials based on a particular structural blueprint is continuously capable of holding a specific weight. In this rather banal sense such a cognitive statement, however, when applied to law, can only be meaningful retrospectively, as a description of past practice (according to which some given legal dogmatics provided the foundation for a given juridicial practice at a given earlier time); but at the present time or in the future it can only function as a practical prognosis or perhaps a projection in the form of wishful thinking, since, as we could see, in a historical bind of forced paths to foresee the promotion of one given (otherwise preferred) selection from the mass of the equally feasible competing or diverging doctrinal paths to be referenced in whatever particular case has no realistic chance.

From the above we have now returned to—as the fourth conceptuality contributing to uncertainty following in the row of our considerations re-

⁷⁵ For the terms involved, see—upon the basis of Lukács’ posthumous opus [note 39]—, by the author, *The Place of Law...* [note 39], ch. 5: ‘Erfüllungssystem’.

⁷⁶ *Ibidem*.

⁷⁷ First stated in a pioneering treatise by Alan Watson in his *Legal Transplants An Approach to Comparative Law* (Edinburgh: Scottish Academic Press 1974) xiv + 106 pp. and ‘Comparative Law and Legal Change’ *Cambridge Law Journal* 37 (1978), pp. 313–336; and for the context above, cf., by the author, ‘Jogátültetés, avagy a kölcsönzés mint egyetemes jogfejlesztő tényező’ [Legal transplantation as a universal factor of legal development] *Állam- és Jogtudomány* XXIII (1980) 2, pp. 286–298 and ‘Tehetlenség és kölcsönzés mint a jogfejlődés döntő tényezői’ [Inability and borrowing as prime factors in legal development] *Jogi Tudósító* [A law review of the Hungarian News Agency] X (1979) 11–12, pp. 4–9 {both reprinted in his *Jogi elméletek, jogi kultúrák* Kritikák, ismertetések a jogfilozófia és az összehasonlító jog köréből [Theories and cultures of law: reviews in legal philosophy and comparative law] (Budapest: ELTE “Összehasonlító jogi kultúrák” projektum 1994) xix + 503 pp. [Jogfilozófiák] on pp. 191–208}.

⁷⁸ Cf., by the author, *Lectures...* [note 31] and *Theory of the Judicial Process* [note 58].

garding ‘law’ ‘science of law’, and ‘science’—the fundamental question associated with the ontological approach and epistemological perspective. I have already mentioned, because of its certain relevant premises material to the current discussion here, my (conceptually) contrarian position to LENIN’s reflection theory, which used to be exclusive dominant in Socialist jurisprudence, and was also largely accepted in Western MARXisations then.⁷⁹ Then and there they perceived law as a category within the domain of reality, because they thought it was something gained from the peculiar reflection of “that exists independently of our consciousness”, and as something best comprehended at the level of “particularity” in the sense of HEGELIAN logic, through the pair of true/false.⁸⁰ Contrary to this, I envisioned in law the presence of deliberate human invention and intervention, an active tool making effort, the process of developing the verbal formation of a technique of influencing. I found but a single reference in support of my idea (one, which if in fact applicable, could prove to become overall decisive) after that I had already been a several-year long immersion into aesthetics, and a connected interest in theoretical reconstructions through language and logic. This was simply just a dropped statement of an East-German formal logician, describing the possibility of giving a verbal description—and registering the original cognitive theoretical irrelevance—of “artificial human constructs” resulting from the willful action of man’s societal activity.⁸¹ It is merely an attribute characteristic not of the definition of law itself, but of the way we utilise our language in general (which is our across-the-board societal tool of communication based on a rather elastic uncertainty), that it can manifest in a form analogous with our everyday statements and theoretical propositions as well. Well, to carry this thought further in order to connect it to old/new modern thoughts, accordingly law has not a reality-existence, but one to serve as a disciplinary directive and thereby normalised “existence”; consequently its specificity is just to prevail as Ought-to-be, defined either by KELSEN within the KANTIAN ontological duality of *Sein* (based on causality) and *Sollen* (to be ascribed to) or as freely substitutable a notion in the transposition of other philosophical tra-

⁷⁹ Cf. Ota Weinberger *Die Sollsatzproblematik in der modernen Logik* Können Sollsätze (Imperative) als wahr bezeichnet werden? (Praha: Československo Akademie Ved 1958) 161 pp. [Rozpravy Československé akademie věd: Řada společenských věd 68/8] and Franz Loeser ‘Zur Frage der Wahrheit in der Moral’ *Deutsche Zeitschrift für Philosophie* 9 (1963) 9, pp. 1104 et seq.

⁸⁰ Mostly VILMOS PESCHKA, with a claim of theory building.

⁸¹ ‘*künstliche menschliche Konstruktionen*’ in Georg Klaus *Einführung in die formale Logik* (Berlin: VEB Deutscher Verlag der Wissenschaften 1959) xii + 403 pp. on p. 72.

ditions. And this will exclude any direct definition/determination by cognitive elements from the criteria of law.⁸²

This is what makes the role dogmatics plays understandable and also what adds some additional meaning needed to move the entire construct forward in its theoretical aspect, to the extent that dogmatics has the effect of rendering its subject free of subjective incidental elements, and to this extent allowing it to play the role it plays with the implied quality of “objectivity”.⁸³ The “requirement of validity” is a certain analytical reference to that which I have earlier attempted to treat in a monographic manner as conven-

⁸² Cf. Cserne ‘Jogdogmatika versus policy’ in *Jogdogmatika és jogelmélet* [note 40], p. 59.

⁸³ In discussing this, perhaps it would have been safer to have avoided getting tangled up in semantic issues. For, without paying attention to the commandably rich international literature strongly debated and contributed in Hungary, too, Bódig (‘A jogdogmatika tág és szűk fogalma’ [note 40], p. 260) proposes as a matter of course the recourse to two equally feasible alternatives in order “to formulate definitions”: either in a “criterial” way (where “it is fairly enough to fulfil a part of criteria only”) or the “criteriological” one (where “a closed set of necessary and sufficient criteria” is to mark off from anything else), as based upon one single notice by Micheal S. Moore in ‘Moral Reality Revisited’ *Michigan Law Review* 90 (1991–92) 8, pp. 2424–2533 on p. 2481, note 172. Well, this terminology only occurs (and I can confirm this after having conducted an electronic search—taking mere seconds—of approximately twenty million pages of nearly fifteen hundred, mostly English language periodicals) in the footnotes of merely two of MOORE’s writings—in a philosophical context indeed, although with an exactly opposite meaning. Furthermore, in the referenced original it is not about these two, and not as a definition, rather as the philosophical representation of “other conventionalist theories of meaning”. One of them being *criterial*, in case of which “given [...] conditions, each individually necessary, only jointly sufficient, for the correct application of the word”, the other being *criteriological*, in term of which “none of the conditions that constitute the criteria for the word are necessary, and no clear subset of the criteria is sufficient”, while the “absence of *all* of such properties precludes [...] and [...] presence of all of the properties guarantees correct application of the word”, and the third in this set is the *paradigm-case*, where a certain appropriately characteristic set of real attributes provides the answer. It becomes apparent from the retrograde reference of MOORE’s footnote mentioned above (and from a self-reference thereof) that the term was first used by him—in ‘Semantics of Judging’ *Southern California Law Review* 54 (1980–81) 2, pp. 151–294 at p. 220—in the context(ual interrelation) of word usage and confirmation by proof, where he rated the legal provability of various connections by differentiating “criterial” from “symptomatic” (with reference to the difference drawn by the law between “direct evidence” and “circumstantial evidence”), following the model provided by an epistemologist’s distinction—Norman Malcolm *Knowledge and Certainty* Essays and Lectures (Englewood-Cliffs: Prentice-Hall 1963) vii + 244 pp. at p. 113—between “criteria” and “symptom”. Later he set off on an vanguard venture when asked to do so by the *Interpretation Symposium* debating issues related to *Methodologies from Other Disciplines* in his ‘A Natural Law Theory of Interpretation’ *Southern California Law Review* 58 (1985) 1–2,

tionalisation.⁸⁴ Which, of course, when observed from the inside, is no more than a statistical fluctuation process; but when looked at from the outside it could be perceived as the description of a past state, as a bona-fide original capacity.

This likeable intellectual attempt at constructing a fundament for *Rechtsdogmatik* exemplifies a certain kind of insurgent movement intent on making a thing scientific. If and insofar as the attempt to reify law, the application of law, legal dogmatics, or jurisprudence is successful, or if it is possible to make it appear as an objective-descriptive resource, then—one would imagine—it will create a sense of stability (safety and certainty) within its own ideological domain. We must, nevertheless, be aware of the fact that it is not this or any similar objectivity feature or cognitive aspect, neither the theoretic form thereof that provides a secure foothold, since any of the above relevant characteristics can at any time become obsolete, forced out of their given role and rendered irrelevant by a strong enough superseding interest (a scenario increasingly more common in our present-day ephemeral affairs); in the meantime loosing its other potential beneficial aspect, that of the possibility of a revelatory explanation, due to its false (problematic) identification. Therefore, as stated in my vision described previously, the suggestion of the notion that cognitive solidification is a valid criterion appears to be—in the previously described sense—nothing but a façade; and in the manner I did try forwarding an explanation through the reformulation of the autopoietical idea of systemicity as a key term applied in the description of the law's ontology—founding this ontology by drawing a contrast between the law's self-description as it is conventionalised in its acts by canonised social practice (taken as a specific legal epistemology), on the one hand, and its same description from an external and retrospective perspective, on the other. Well, in fact the true security in/of law lies in the very con-

pp. 277–398 at p. 277. It is in the footnote of the latter that in relation to the current philosophical representation of the tradition of the identification of meaning and definition originating with JOHN LOCKE [from his *An Essay concerning Human Understanding* I-II, ed. A. C. Fraser (Oxford: Oxford University Press 1894)], MOORE calls, on the one hand, the standpoint of logical positivism a criterial semantic theory—exemplified by Rudolf Carnap 'The Elimination of Metaphysics through Logical Analysis of Language' in *Logical Positivism* ed. Alfred J. Ayer (Glencoe, Ill.: The Free Press & London: Allen & Unwin 1959), pp. 60–81 {Library of Philosophical Movements}—, and on the other hand, the WITTGENSTEINIAN approach—developed in Ludwig Wittgenstein *Philosophische Abhandlungen* / *Philosophical Investigations* trans. G. E. M. Anscombe (Oxford: Basil Blackwell 1953)—a criteriological theory.

⁸⁴ Cf. note 77.

tinuity of the reconventionalising reproduction of praxis itself, in the self-reproducing force of this continuity and the reliability of such a praxis, also able to regenerate—by sublating—the tradition frameworking it.

b) Ad Tamás Győrfi 'The Conceptual System of Law and the Dogmatics of Motivations'

Although what my commentator seemingly does is the widening of the scope of the problem being discussed, but in fact behind this appearance what he really does is that he replaces the original problem, and essentially sets a demand for a new doctrinal vision, since his pioneering endeavour is focused on a proposed domestic introduction of what is the current (and as of this time primarily) American trend of jurisprudence of reasons resting on the practice of decision by reason, and with this he attempts to develop his problem from a corresponding perspective based on an appropriate doctrinal approach.

What exactly are we talking about here? A well-known American law journal recently came out with an issue dedicated to the comprehensive overview of recent achievements in legal theory and history that have fundamentally influenced our legal perspective, and this publication contained a piece of writing on the *Law's Empire* written with a novel approach by a respected scholar of jurisprudence in North America. He comes to the convincing conclusion in his piece as follows:

“When this [the generalizations that distinguish rule-based decision-making from particularized decisionmaking] happens, rules have disappeared, and decisions by reasons alone in the order of the day.”⁸⁵

As it is apparent from the context, this is not simply criticism or redevelopment of the original material, but instead this is the contemplation of a fundamentally dissimilar homogeneity, that is, the consideration of the feasibility of a “legal ideal” different from that of the jurisprudence of rules built on the foundation of decision by rule; and at the same time this involves the investigation of the potential of the utilisation of DWORKIN’s theoretical output with this aim.⁸⁶

⁸⁵ Frederick Schauer ‘The Jurisprudence of Reasons’ *Michigan Law Review* 85 (1987) 5–6, pp. 847–952 on p. 869.

⁸⁶ For the terms, see *idem.*, p. 866.

Well, the Hungarian commentator's treatment (and restating) of the problem is thought-provoking because it is thoroughly reasoned. The context described above serves as the framework of his proposed understanding of the rule-clarifying (specifying) and rule-rationalising functions of the doctrinal study of law;⁸⁷ two discrete roles that have common features as far as my personal understanding of this issue is concerned, in that both are constructive in nature, they both add to the original material, furthermore, they can both potentially even serve as rule-*a d j u s t i n g* (and thereby indeed *f o r m a t i v e*) forces, since theoretically it could obviously arrive at a different clarification and/or rationalisation. Nevertheless, it seems for me to be less evident, weather performing these intellectual routines—even just as a theoretical exercise—could in fact lead anyone to the “exposition of the entire meaning of the law”.⁸⁸ I happen to recognise the reappearance of *mos geometricus* in the workings of this approach—this time in the cloak of American theorising, since we have no point of fixed reference available to us, compared to which we could expect, require or judge any sense of entirety or completeness. As we could see earlier, law merely prevails—without it(self) having command over either *in se* and/or *per se* meaning,⁸⁹ or the attribute of being systemic.⁹⁰ I myself have previously supposedly made it clear through the concept of *l e g a l i m a g i n a t i o n* and in part through that of *r e f l e c t i v e e q u i l i b r i u m*, that we can never talk about abstract-universal wholeness, rather only about a trial or test carried out with a defined set of grasped/thinkable cases as mere instances.⁹¹ Consequently, the reconstructive unfolding taking place in this process is not more to result in a law to be taken as complete, rather it happens with changed (or changing) objectives reflecting (and responding to) contempo-

⁸⁷ Győrfi ‘A jog fogalmi rendszere...’ [note 63], pp. 40–44.

⁸⁸ *Ibid.*, p. 43.

⁸⁹ I assume to have successfully dealt with this intellectual trap already in my *Lectures...* [note 31].

⁹⁰ For this reason, the wording of the comment's title itself is at best allegorical, since “the conceptual system of law” is not a sign of the bearer or the representative of the law's posited normativity; as this can only be interpreted when projected onto the whole existing institutional network developed upon law (including both its practical and theoretical cultivation).

⁹¹ Cf. James Boyd White *The Legal Imagination Studies in the Nature of Legal Thought and Expression* (Boston & Toronto: Little, Brown & Co. 1973) xxxv + 986 pp. See also, by the author, *A jogi gondolkodás paradigmái* [note 74], in particular p. 459 and *Jogfilozófia az ezredfordulón* Minták, kényszerek – múltban, jelenben [Philosophy of law at the turn of the millennium: Patterns and forced paths in the past and in the present] (Budapest: Szent István Társulat 2004) 450 pp. [Jogfilozófiák], especially on pp. 235–236.

aneous practical challenges; and although the temporal consecutiveness creates an illusion of a steadily increasing degree of wholeness, nevertheless, the sequential accumulation is just a direct consequence of the fact that it responds to the issues present in whatever praxis dominant at the given time.

At the same time, the question remains rather discomforting about the true nature or substance of dogmatics in case no rule exists.⁹² Since we are of the same opinion in that “the rule as such is not spelled out in the law of precedents, and indeed it has to be deciphered from the specific case”,⁹³ thus this rule is always *ex post facto*, it is relevant only to the given case and only to the decision in question, therefore the very rule itself is at best virtual, hypothetical, and competing; while at the same time, despite all of this, a certain reliable and credible continuity does in fact result, with such—purely practical—reference points included that allow both distinguishing and overruling to become comprehensible,⁹⁴ thus it has the utility of establishing the ability to measure against something. The temptation to formulate a pan-dogmatism is obviously misleading. Consequently, there is little chance that it would have a revealing effect if we were to use a rational-logifying theoretical reconstruction (thus one that presupposes some sort of a closed system in its given state), even some place where the entire well-furnished prevailing arrangement and its inherent fundamental approach precludes this idea from the range of options that could be reasonably proposed. I assume that the only way we could get closer to gaining an understanding of the methodic aspects of procedures rooted in classic Roman, Anglo-Saxon (or other) legal traditions at some point in the future is through historical-comparative investigative study only; these sorts of studies are unavailable in a sufficiently detailed form even in international literature (and this will presumably have to wait until such time when the declared program of the comparative judicial mind will have gained enough momentum and strength).

What is then the nature of the “dogmatics of motivation”? We learn that on the one hand, it itself generates rules,⁹⁵ since as soon as the standardisation of (decisionmaking-minded) consideration process of weighing begins, it will inevitably lead to an end result of the formulation of

⁹² Győrfi ‘A jog fogalmi rendszere...’ [note 63], p. 44.

⁹³ *Ibid.*, p. 46.

⁹⁴ *Ibidem.*

⁹⁵ *Ibid.*, p. 52.

a new rule appearing as the result of (and *via*) necessary transformation, and on the other hand, it takes away from the exclusive character of the apparent dominance of lingual-logical correlation and analysis. Nevertheless, I would assume that the circumstance according to which the “fundamental” or “essential” nature⁹⁶ of the doctrinal study of law is of a lingual-logical force remains unchanged despite the declared opposition of the commentator; due to the fact that fundamentally the legal character of the conclusion is inevitably lent by the rule—in the form of a rule of behaviour, empowerment or by the establishment of similar frameworks. While at the same time it is also obvious—and from this point on his sophisticated argument is completely reasonably defensible—that as soon as the validity-transfer or the establishment of the framework of validity has taken place commencing from this lingual-logical base, the taking into account of any kind of practical consideration, deliberation or weighing can claim a place in and/or next to or upon it—depending on this rule, and its empowerment—with the parallel development of appropriate methodologies. However, it can hardly do the same outside of it and against it—at least not in an overt manner—since in that case this could only be conceived *contra legem*.

c) *Ad Péter Cserne ‘The Doctrinal Study of Law versus Policy’*

It feels good to get confirmation (by reading the comprehensive and detailed analysis of the literature by the comment) of my presumption that at least the German school of legal dogmatics is more conservative—among other reasons perhaps because the large mass of its own highly respectable past weighs heavily on it, and this causes it to stop short of too easily floating off and rising into thin air. The subject of “jurisprudence in a narrow and particular sense”, used as an example here, has been solely the “legal concepts”—i.e. *juristische Begriffe*,⁹⁷ and not the verbal arbitrariness hidden in the phenomenon of *gesetztes Recht* itself. Yet with this, scientific analysis can indeed reach a *Rechtslehre*-type framework, and can produce a certain legal geometry comprised of interrelated mentally projected constructs arrived at by way of having become somewhat independent of the normative material, by making use of abstraction.

It seems to be a convincingly more realistic possibility that, instead of striving unendingly for, but never getting satisfactorily close to integration

⁹⁶ *Ibid.*, pp. 46 & 54.

⁹⁷ Hans-Peter Schwintowski *Juristische Methodenlehre* (Frankfurt a. M.: Verlag Recht und Wirtschaft 2006) 243 pp. [UTP-basics] at p. 97.

into science, the common base be considered a rationalisation that carries the viability or chance of critical reevaluation.⁹⁸

Well, in the case of this kind of an analytical foundation it is no longer considered a problem if it turns out that

“In terms of their content (i.e., with respect to their consequences) often the same results are reached by judges functioning in different legal systems by way of making use of varying dogmatic constructs.”⁹⁹

since this in fact contributes to the confirmation of the law’s fundamentally ‘practical a complex’ nature, and thus proves—correspondingly to my own reasoning reproducing the thought of LUKÁCS—that through law just such a genuinely socio-ontological mediation [*Vermittlung*] takes place, upon which normative deduction and proof is built merely at a level of phenomenon, and as a validity-derivation, in order to formally satisfy its own “system of fulfilment” [*Erfüllungssystem*].¹⁰⁰ Consequently, it does not create a problem (as at the most it speaks of the level of mediation inherent in and performed by law), if we were also to realise that differing conceptual constructs reconstruable behind the lingual manifestations functioning as the platform of law can individually carry identical materialities (or vice versa: apparently identical ones can carry differing ones), thus essentially a merely formal, textual comparative analysis can target nothing but only the formal outer shell of the law.¹⁰¹

Law in its posited quality can vary, but it has to be solid in the aspect where it empowers and sets limits to actions. On the one hand, the truth that is connected to all social mediators (language, law, etc.) remains unchanged, according to which, in order to fulfil their ontological function, they simultaneously have to demonstrate a necessary level of the force of definition and an appropriate level of indeterminateness, while the trends of strengthening ties to bind (such as the efforts to make language more unambiguous, and to make law definitive) are historically immediately followed by a tendency to loosen these ties (with the offering of discretionary power, introduction of uncertainty, and by way of prepping the ground in

⁹⁸ Péter Cserne ‘Jogdogmatika versus policy’ in *Jogdogmatika és jogelmélet* [note 40], pp. 58–67 at p. 58.

⁹⁹ *Ibid.*, p. 64.

¹⁰⁰ Cf., by the author, *Lectures...* [note 31].

¹⁰¹ Cf., by the author, *Jogfilozófia az ezredfordulón* [note 91], part on »Összehasonlító jogi kultúrák« [Comparative legal cultures], pp. 9–66 and in particular on p. 43, note 45.

advance of the starting of new paths with differing conceptualisations and novel concept-creation through splits and specification, and so on). On the other hand, it is important for us also to remember, in what cornerstones and in what referential culture of construction and operation, i.e., in what referencing of the law's normative web weaving over social practice does *par excellence* legal homogeneity—called “the distinctively legal”¹⁰²—differ from all other (homo- or hetero-)geneities.

The actual practical statement that “the dogmatically tied and the result-oriented modes of argumentation are in a complementary interrelation” with one another,¹⁰³ is only valid with the caveat that the establishment of boundaries serving as the framework in foundation is always done within “dogmatic bounds”. Consequently, however, the internal balancing of and setting of proportional ratios of just exactly how much the additional, detailed development of regulation advances the otherwise strongly asserted or barely subsiding or just disappearing heritage of the pursuit of an unambiguous definition, and to what extent does it leave room for what could be termed a multiplayer intercultural debate (thus one that to some extent reestablishes heterogeneity within the homogeneity that serves as the foundation¹⁰⁴) can be considered an open issue, allowing room for the trends of the time and all kinds of experimenting.

2. In an Onto-epistemological Perspective

In relation to this original necessity, naturally, it is only an incidental question: What is the total number of transpositions of this necessity that have been presented by the doctrinal study of law so far, and what kind of transposition is this, and what metastasis is presented by dogmatics, the very topic we are debating here and now. This is why it is so important—at least for me it is—to make it clear that from the outset, as outer observers, law is

¹⁰² For the term, see Philip Selznick ‘The Sociology of Law’ in *International Encyclopedia of the Social Sciences* ed. David L. Sills (New York: The Macmillan Company & The Free Press 1968), p. 51.

¹⁰³ Péter Cserne ‘Jogdogmatika versus policy’ [note 98], p. 67.

¹⁰⁴ Cf., by the author, ‘Meeting Points between the Traditions of English–American Common Law and Continental–French Civil Law (Developments and Experience of Postmodernity in Canada)’ *Acta Juridica Hungarica* 44 (2003) 1–2, pp. 21–44 {& <<http://www.akademiai.com/content/x39m7w437134167l/?p=056215bc56447c8f9631a8d8baada3&pi=1>> & <<http://www.akademiai.com/content/x39m7w437134167l/fulltext.pdf>> }.

a given entity for all of us, and surrounding it there is another given, that of a legal culture. And whatever is the doctrinal study of law or any kind of similar component, can only be made sense of within the domain of the above mentioned spheres, thus only inside the framework established by their interpretational range and sensibility. Consequently, however, as soon as the object of our investigation is not some sort of an exterior attribute, thus some *per definitionem* already only a *hic et nunc* graspable thing, because of having been produced historically, consequently particularly, i.e., in the phenomenal world, it is one that represents merely one of multiple possible (different) phenomena, which is, furthermore, to be described first as a necessary precondition of any thought process to be started in connection with it, well, if we leave all that is real (i.e., all that is graspable in whatever way to be made described and related in its existence in reality) behind, then nothing more is left over in science than self-serving obstinacy, intellectual self-construction, which, if it so happens, we are free to exercise as projected onto things, as a form of free *extrapolatio* as well. Since if the desire to understand phenomena in their historical context were to fade, and if the comparative interest we have in the reality of functioning systems were to drop off, then instead of real science, the audience would merely be witnessing the sorry contest of conceptual divertissements, verbal wizardries, universalisations, and verbal geometry-(mis)constructions parading on stage.

ON FORMS AND SUBSTANCE
IN LAW

STRUCTURES IN LEGAL SYSTEMS

Artificiality, Relativity and Interdependency of Structuring Elements in a Practical (Hermeneutical) Context*

1. Theoretical Background [179] 2. Foundations of Structuring Challenged [181] 3. Is there a Structure had? [184] 4. Structuring as a Meta-construct [186]

1. THEORETICAL BACKGROUND

The unquestionable hegemony of the idea of the positivity of law lasted until the final third of the 19th century on the European continent, throughout the age of the exegetic application of statutory instruments, until the dawn of the free-law movement. Although re-codification was not effected in the second half of the 20th century—with the exception of the direction of development taken by socialist law—and the classical civil codes became gradually reduced from their classical function of defining the law to the increasingly passive role of being used as mere systemic *locus*-providers and *locus*-indicators of the direction and conceptuality taken by judicial law development,¹ the legal doctrine has nevertheless successfully reduced the disintegration caused by the free-law movement and maintained a positivistic domination for yet another century on the European continent. Though legal positivism was not shattered by the brief rebirth of natural law that took place after the Second World War (as a post-war German reaction to warmongering), finally, the way questions were posed in legal sociology in

* Prepared as a Hungarian National Report on the topic I.B.I.—*The Structure of Legal Systems*—for the Sixteenth International Congress of Comparative Law held at Brisbane in 2002 and published in *Acta Juridica Hungarica* 43 (2002) 3–4, pp. 219–232 {& <<http://www.akademiai.com/content/r27863g6u01q777u/fulltext.pdf>> & <<http://www.akademiai.com/content/r27863g6u01q777u/fulltext.pdf>> & in *La structure des systèmes juridiques* [Collection des rapports, XVI^e Congrès de l'Académie internationale de droit comparé, Brisbane 2002] dir. Olivier Moréteau & Jacques Vanderlinden (Bruxelles: Bruylant 2003), pp. 291–300}.

¹ Cf., by the author, *Codification as a Socio-historical Phenomenon* (Budapest: Akadémiai Kiadó 1991) viii + 391 pp., ch. V para. 5, especially at p. 121.

Europe (from the 1910s on, launched by EUGEN EHRLICH), the American “realist” pragmatism (from the 1930s on, inspired mainly by ROSCOE POUND), the transformation of the new English linguistic and logical analysis of law (from the 1960s on, initiated by H. L. A. HART) into an American-type reconstruction of legal discourses (effective from the 1970s, represented by RONALD DWORKIN), and, at last—as a stroke of grace—in Europe itself, the stabilisation of the so-called anti-formalist stand (formulated by MICHEL VILLEY and CHAÏM PERELMAN) in the debate on law and logic and its progress into a reconstructive inquiry of legal processes, on the one hand, and the foundation of a continental theory of argumentation, cultivated almost as a substitute for legal dogmatics (mainly introduced by ROBERT ALEXY and AULIS AARNIO), on the other—well, all these challenged the validity of unconditional adherence to legal positivism—even if exclusively in theoretical terms—, made it outdated by the 1980s.² In brief, what had seemed, just a few decades ago, to be a demand (guided by wishful thinking) for the “decline” of legal positivism, is now rather anticipated by several visions—instead of as a stigma of decay—as the image of a positive escape forwards, resulting from its transcendence as transformed into something new, in a way, however, accompanied by a reassuring continuity.³

Nevertheless, the theoretical dominance of legal positivism in its era offered two possibilities: accepting the actual definition of the law through positive law in practical legal processes while explaining any kind of eventual difference as only an exceptional deviance, on the one hand, and also taking the formal and official positivation of the law as a theoretically descriptive conceptual criterion of legal phenomena, on the other. While the latter was cut relatively soon as applied to the notion of juridicity itself,⁴ and

² For an overview, cf., by the author, *Theory of the Judicial Process* The Establishment of Facts (Budapest: Akadémiai Kiadó 1995) vii + 249 pp., ch. I.

³ For the decline, see, e.g., Michel Villey ‘Essor et décadence du volontarisme juridique’ *Archives de Philosophie du Droit* 3: Le rôle de la volonté dans le Droit (Paris: Sirey 1958), pp. 87–136. As to continuity, it is characteristic that—only to take just one telling example—the editor of *Transformation de la culture juridique québécoise* dir. Bjarne Melkevik (Québec: Presses de l’Université Laval 1998) 246 pp., Avant-propos, p. 7, had to leave his working hypothesis behind as unfounded. Albeit the sub-topic of the debate in question was heralded as „Est-ce la fin de l’hégémonie positiviste?“, it does not feature any longer in the printed collection of the proceedings, as the workshop has proven just the antithesis, namely, „l’hégémonie positiviste ne touche nullement à sa fin au Québec, pas plus qu’en d’autres lieux”.

⁴ As a programme and a realisation, cf., by the author, ‘Quelques questions méthodologiques de la formation des concepts en sciences juridiques’ [1970] *Archives de Philosophie du Droit* XVIII (Paris: Sirey 1973), pp. 205–241, para. 4, in particular at pp. 223 et seq. [reprinted

moreover, the former was also cut back conclusively (and was mainly replaced by explanation within the framework of the processes of an overall autopoietic system),⁵ paradoxically all this has hardly affected the range of problems raised by “The Structure of Legal Systems”.

2. Foundations of Structuring Challenged

In the field of continental Civil Law, it seemed to be a self-evident fact, not questioned by anybody until the recent decades, that the structure of legal systems consists partly of their visible external division (according to the branches of the law and, inside any of them, according to its formal sources) —that is, their division into individual branches of the law, including the relevant provisions of the Constitution, the respective code(s) and law(s), the eventual decrees and orders designed to ensure their implementation, as well as the judicial guiding principles, decisions for the uniformity of jurisprudence, and the individual judgements—, and partly of the internal (logical) self-division of any legal (normative) regulation resulting from the axiomatic ideal of modern legislation, that is, the fact that regulation is mostly effected by general rules and particular dispositions in the general, as well as the particular parts of the law-code in question, on the one hand, and by established principles, main rules (disposing of the particular area of reg-

in his *Law and Philosophy* Selected Papers in Legal Theory (Budapest: Eötvös Lóránd University Project on “Comparative Legal Cultures” 1994), pp. 7–33 {Philosophiae Iuris}].

⁵ Cf., as a philosophy of language reconstruction, by the author, *Theory of the Judicial Process* [1987] [note 2], passim, and ‘The Context of the Judicial Application of Norms’ [1988] in *Prescriptive Formality and Normative Rationality in Modern Legal Systems* Festschrift for Robert S. Summers, ed. Werner Krawietz, Neil McCormick & Georg Henrik von Wright (Berlin: Duncker & Humblot 1994), pp. 495–512 [reprinted as ‘The Nature of the Judicial Application of Norms (Science- and Language-philosophical Considerations)’ in his *Law and Philosophy*, pp. 295–314], and, as a restatement characteristic of the critical legal studies, William A. Conklin *The Phenomenology of Modern Legal Discourse* The Judicial Production and the Discourse of Suffering (Aldershot, etc.: Ashgate 1998) xii + 258 pp., respectively. It is to be noted that essays on the turn of the 19th and 20th centuries in Central Europe already explored such arguments for theoretical explanation. Cf., above all, Karl Georg Wurzel *Das juristische Denken* (Wien: Verlag Moritz Peries 1904) vi + 102 pp. [trans. Ernest Bruncken as ‘Methods of Juridical Thinking’ in *Science of Legal Method* (Boston: The Boston Book Co. 1917 [reprint: New York: Kelley & South Hackensack, N. J.: Rothman 1969]), pp. 286–428 {The Modern Legal Philosophy Series IX}].

ulation), rules (breaking them further down in concretisation), exceptions (allowing concessions from these), as well as sub-exceptions (making additional concessions available with regard to their last specification), on the other. All this encountered no problems for a long time, because it was made visible exactly in this way; however, because a number of legal theories (including, of course, that of MARXism) were also trying to find (through simplifyingly viewing law as the reflection of something else, external to and outside of it, hence having to conform in features, structure, etc. to what it is a reflection of) a kind of correspondence between law and the spheres of (social) reality regulated by it that is not merely instrumental and/or functional, but also epistemologically interpretable;⁶ as well as because these theories took far too seriously the suggestion of all the positive law's staff on the exclusivity of established juristic methods in legal processes. This was the shift in codification from the casuistry to the axiomatic ideal, the transition from the creative precedential induction (the method of comparing, assimilating and distinguishing those precedents, taking the individual cases as a starting point), to the reproductive and mechanical, deductive rule-application (starting out from the mass of provisions at various degrees of generality of the code, construed as constituents of one logical system, following the axiomatic ideal).⁷

The DWORKINian theoretical challenge has made it clear that there are principles in every system that are, as to their nature, not only different from the rules but, in fact, control the very policy of the applicability of rules and, thereby, also their actual practice.⁸ Well, it is not by mere chance

⁶ Cf., e.g., Mihály Samu *A szocialista jogrendszer tagozódásának alapja* [The basis of divisions structuring the socialist legal system] (Budapest: Közgazdasági és Jogi Könyvkiadó 1964) 268 pp., and, as its ontological criticism, by the present author, *The Place of Law in Lukács' World Concept* (Budapest: Akadémiai Kiadó 1985 [reprint 1998]) 193 pp., ch. 5, para. 3, especially at pp. 123 et seq.

⁷ Cf., by the author, *Lectures on the Paradigms of Legal Thinking* (Budapest: Akadémiai Kiadó 1999) vii + 279 pp. [Philosophiae Iuris], ch. 2, para. 1, pp. 9 et seq. See, also by the author, as the first critical formulation of its primitive idea, with his proposition to transcend it, 'A magatartási szabály és az objektív igazság kérdése' [Rule of behaviour and the question of objective truth, 1964] in *Útkeresés Kísérletek — kéziratban* [The Search for a Path: Early Essays in Manuscript] (Budapest: Szent István Társulat 2001), pp. 4–18 [Jogfilozófiák] and, as applied to the paradigm of basis and superstructure in MARXism, 'Autonomy and Instrumentality of Law in a Superstructural Perspective' [1985] *Acta Juridica Hungarica* 40 (1999) 3–4, pp. 213–235.

⁸ Since the classical *topos* by Ronald M. Dworkin's 'The Model of Rules' *University of Chicago Law Review* 35 (1967) 1, pp. 14–46, his entire oeuvre seems to substantiate the underlying idea mostly in a constitutional context.

that, based upon this, it was in the United States of America, the flagship of politicised aspirations and expectations, that the practice known as constitutionalisation (subjecting any issue at will to be reduced to—through being inferred directly from—basic rights or constitutional values)⁹ had evolved. In parallel with this, as a result of the compromise between the needs of changing life and the technical availabilities offered by the law's codification, after the Second World War the German style of legal dogmatics had, as its own construction developed from a practice based on general clauses, already definitely nourished a conception of law that defined it as a texture made up of principles and rules.¹⁰

However, just as facts never get to court by themselves, labelled and prepared for a syllogistic inference from the complex of facts and norms¹¹ (but only as the result of a creative—both *n o r m a t i v e*¹² and *c o n -*

⁹ For a dissent in a similarly politicised mirror, see Robert H. Bork *Slouching towards Gomorrah* Modern Liberalism and American Decline (New York: Regan Books / Harper-Collins 1997) xiv + 382 pp. Also cf., by the present author, 'Önmagát felemelő ember? Korunk racionalizmusának dilemmái' [Man elevating himself? Dilemmas of rationalism in our age] in *Sodródó emberiség* Tanulmányok Várkonyi Nándor: Az ötödik ember című művéről [Human species drifting: On Várkonyi's The Fifth Man] szerk. Mezey Katalin (Budapest: Széphalom 2000), pp. 61–93, in particular at pp. 71–76.

¹⁰ Cf., above all, Robert Alexy *Theorie der Grundrechte* (Baden-Baden: Nomos 1985) 548 pp., and, as built into a coherent theory, Béla Pokol *The Concept of Law* The Multi-layered Legal System (Budapest: Rejtjel 2001) 152 pp., particularly ch. VIII, pp. 90–106. For the overall debate, cf., e.g., Carl E. Schneider 'State-interest Analysis in Fourteenth Amendment »Privacy Law«: An Essay on the Constitutionalization of Social Issues' *Law and Contemporary Problems* (1988) 1, pp. 79–121; Charles R. Epp *The Rights Revolution* Lawyers, Activists, and Supreme Courts in Comparative Perspective (Chicago & London: Chicago University Press 1998) xv + 326 pp.; Henning Koch *Constitutionalization of Legal Order* Judicial Review of the Constitutionality of Legislation (1988) [Danish Report to the XVth World Congress of Comparative Law (Bristol)]; Ewa Popławska 'Constitutionalization of the Legal Order' *Polish Contemporary Law* (1998) 1–4, pp. 115–133.

¹¹ "For court purposes, what the court thinks about the facts is all that matters. For actual events [...] happened in the past. They do not walk into the court." Jerome Frank *Courts on Trial* Myth and Reality in American Justice (Princeton: Princeton University Press 1949) xii + 441 pp. on p. 15.

¹² See, e.g., most expressedly by Joachim Israel, 'Is a Non-normative Social Science Possible?' *Acta Sociologica* 15 (1972) 1, pp. 69–87 and 'Stipulations and Construction in the Social Sciences' in *The Context of Social Psychology* A Critical Assessment, ed. J. Israel & H. Tajfel (London & New York: Academic Press 1972), pp. 123–211.

s t r u c t i v e ¹³—act of the judicial forum taking a decision),¹⁴ similarly, neither the principles nor the rules are given in themselves, separated as such from each other in a way classified according to the law's taxonomic systemicity as bearing their own, separate meanings. As is known, all this can only be the result of a creative act. Based upon the d o c t r i n a l s t u d y o f l a w , which classifies the law's notions by transforming them into constituents of a legal system, it is the j u d i c i a l f o r u m , exercising its authority while undertaking its exclusive responsibility to decide, that builds different propositions into (or, properly speaking, uses them in its reasoning openly or implicitly as) either principles or rules, respectively. And, in parallel with this, it is their p o s t e r i o r a n a l y t i c a l r e c o n s t r u c t i o n that will also label them, interpreting the immense mass of normative regulations and reasonings, used just as raw materials, as either principles or rules.

3. Is there a Structure?

Does the legal system itself have a structure, or is any structure taken into (or given to) it from the outside? And if it is taken, who is taking it? I think it would be absurd to give any kind of negative answer: how would it be possible to transplant any structure into something thought to be unstructured by itself? Or, for the sake of a reasonable answer, we have to hypothesise the legal system as being s t r u c t u r e d in itself. However, the questions “what is it?” and “what does it consist of?”, “how is it divided and into what?” and “what is the meaning of this all and of any of its structured components?”, as well as “what is the significance of its being structured?”—well, all these already depend upon the sense given (or, more precisely, attributed) to law.

Formerly, in a somewhat similar context, I already presented the figure of three partially intersecting circles. This was intended to prove, as against the normativist message of legal positivism (claiming that by means of norms alone one can bring about a medium with its own existence, capable of effective operation in social practice), that the criteria for the law set when it has been made positive do not necessarily imply more than mere manifesta-

¹³ See, e.g., most forcefully, Hans Kelsen *Reine Rechtslehre* Einleitung in die rechtswissenschaftliche Problematik (Leipzig & Wien: Franz Deuticke 1934) xiv + 236 pp.

¹⁴ Cf., by the author, *Theory of the Judicial Process* [note 2], passim.

tions of an intention that existed at the time of positivation. Therefore, the concern about what the law was intended to be (i.e., to signify and represent) by its drafter(s) when it was promulgated (e.g., in legislation) is not necessarily identical with the one about what and how the law is being formed into—when re-asserted, adapted or having ceased practically to exist—in either its official “application” (e.g., in judicial practice) or its actual community practice respecting the unofficial and spontaneous, popular ways of customary proceeding as if for legal effect.¹⁵

Well, we can apply again the aforementioned figure (implying the practice of hermeneutical communities, giving and exchanging meanings) as reflected by the issue of the internal structuring of the legal system itself, by placing the intersecting circles into a circle partly closed. [See the figure on the next page!] This is because the legislature may influence the decision to be taken by the legal and/or social community as to what is what amongst the possible structuring components of the legal system and also as to what kind of one-sided or symmetrical connection is being implied by each of these in what type of horizontal or vertical context. However, we also have to bear in mind that, according to the nature of things, any creature of the legislature can exclusively become productive in the hands and through the understanding of its addressees as clients—as operated by its professional official administrator and/or the practice of non-professionals—through their standardising pattern which, as conventionalisingly re-asserted, may become organised as and integrated into social tradition. There is one considerable difference from the instance invoked above, relating to the theoretical understanding of facts, notwithstanding. That is, the entirety of the processes and interactions in question is mediated through and within the bounds of a *l e g a l d o c t r i n e*, that is, by the conceptual sets and contexts of its prevailing *d o g m a t i c s*, constantly refined by both practitioners and scholars of the law, i.e., by dogmatics that albeit mostly lacks officially established and formal qualities, yet exerts, by means of professional socialisation, a nearly exclusive impact upon how the law, as explored and solidified in its internal system, is actually understood and practised. And there is no need to say that the more the legal processes (legislation and administration of justice) are practised and controlled by the *l e g a l p r o f e s s i o n*, the more the *d o c t r i n a l* representation and mediation of the law prevails.

¹⁵ Cf., by the author, ‘Anthropological Jurisprudence? Leopold Pospíšil and the Comparative Study of Legal Cultures’ [1985] in *Law in East and West* ed. Institute of Comparative Law of the Waseda University (Tokyo 1988), pp.265–285, especially at pp. 271–272.

enough to convince those who control the issue we propose, in the procedural hierarchy. In so doing, we start from a nearly optional formulation of normative language and reasoning (or from any expressions or even fragments of these), and within the boundaries of the internal 'rules of the [legal] game' (of how to proceed in identification, argumentation and induction/deduction, etc.) as established and re-confirmed by the legal profession in practice.

Of course, in practice all this appears as dynamism, and not as chaos; as openness to new issues, but by no means unforeseeability lacking any perspective. This assumes creative and constructive co-operation with normative force on behalf of all actors and, at the same time, a community game processualised in formal sequences, as controlled in multiple ways many times; a game in which, although equal chances are granted to everyone in principle and anyone may innovate or deviate from earlier rules, anybody doing so not only has to give motives and justification for this, but also to derive this as inevitably resulting (even if not perceived and not practised by anybody else so far) from the normative order that is continuously claimed to have remained untouched as a whole, and thereby again re-established and re-asserted (that is, re-conventionalised) in its overall arrangement.¹⁶

As a final conclusion, notwithstanding, in the long run and in their practical continuity, both the structuralisation of the legal system and the considerable stability of the way it is made up can be taken as granted. As opposed to the obvious architectural analogy in this case, our edifice is not built into one single construction by assembling components originating from different sources and made up of different elements—in architecture, bricks, mortar and plaster. On the contrary, we build and live the lawyer's

¹⁶ All this recalls the obvious parallel with the challenge of EUCLID's geometry by BOLYAI and LOBACHEVSKY. "From an external point of view [...] the creation of »another new world« is manifest in the choice between equally eligible incidentalities and the presentation of the selected variant as perfect and logically necessary. [...] This concerns conceptualisation, namely the fact that conceptual systems, be they as perfect as possible from an internal point of view or had they the most convincing explanatory force when describing the external world, can merely be regarded as mental experiments. They are nothing but games, which we make use of *faute de mieux*." Varga *Lectures*... [note 7], p. 38.

It is to be noted, however, that legal systems that have achieved a mature and balanced state are characterised exactly by the conscious institutionalisation of the ability to challenge the system from within the system (as their own judicial solution on account of gaps in the law unfillable otherwise, pursuant to, e.g., overruling precedents in England or § 1 (2) of the Swiss *Zivilgesetzbuch*); however, due to the self-disciplining force of the system, this does not proliferate in practice, being resorted to as a corrective measure only as a last resort.

profession using the only material at our disposal, language, in which words are selected to refer to concepts so that a suitable series of intellectual (logical) operations can be performed.¹⁷ Well, the question of which word stands in the place of what (the role it will be used in and what it will refer to in the given hermeneutical situation) depends, in addition to the language use socialised and conventionalised,¹⁸ in a direct sense exclusively on those who perform the intellectual (logical) operation in question. And the person concerned is involved as a hermeneutical actor in the given circles of communication, on the one hand, and, at the same time, is also an actor in some sociological situation, on the other, who, in average cases, will act in the way he is expected to, not exceeding the justifiable boundaries of his professional socialisation(s).

It can be established, therefore, that in our human world one acts amongst and as confronted with a huge number of various *donnés* crystallised in conventionalised (and continuously re-conventionalising) tradition, that is, *donnés* that never stand by themselves as they are never freed from their human-given meaning. Time after time *construits* are being generated out of these, for and to the benefit of a man performing an action, which will be transmitted to his fellows and to the posterity, only to become a tradition that, in its turn, will be further handed down again merely in its quality as a *donné*.¹⁹ Well, if we inquire, in an ontological sense, about the continuity and practicality of these and the safety of their meaningful transmission, we can confirm that, throughout the historical process of conventionalisations, a kind of “tendential unity”²⁰ can always be safely recognised—both in the sense of the actuality of their functional correspondence to the overall social practice and of the reliability of their materialisation through speech acts.

All in all, my report has intended to present, as a basis, the elementary component of the idea underlying the questions set forth above, namely, the apparent paradox traceable in it, according to which structuring features in law are, in their massive incidence, construed/constructed and construing/constructing at the same time, for they do not and cannot exist in and by themselves at all.

¹⁷ For the stand of logic and conceptuality in human thinking, cf., by the author, ‘Az ellentmondás természete’ [The nature of contradiction, 1989] in his *Útkeresés* [note 7], pp. 138–139.

¹⁸ Cf., e.g., François Ost ‘Le code et le dictionnaire: Acceptabilité linguistique et validité juridique’ *Sociologie et sociétés* XVIII (avril 1986) 1, pp. 59–75.

¹⁹ For the expression of FRANÇOIS GÉNY, cf. Varga *Lectures...* [note 7], p. 4.

²⁰ For the expression of GEORGE LUKÁCS, cf. Varga *The Place of Law...* [note 6], *ibidem*.

GOALS AND MEANS IN LAW*

1. The Neutrality of Techniques [189] 2. JOHN PAUL II [191] 2.1. On Personhood, his/her Goods, and Law [191] 2.2. On Person, Family, and Nation [196] 3. Artificiality and Antithetical Developments in Law [198]

1. The Neutrality of Techniques

In the age of modern formal law, most of our social institutions are organised and regulated in depth according to a bureaucratic model. Since the analyses carried out by MAX WEBER, we have been fully aware of the significance and long-term impact of this fact and also of the reifying influence it may exert on the underlying relations.¹

In the field of jurisprudence, it has been pointed out by the research of, e.g., FRIEDRICH CARL VON SAVIGNY, FRANÇOIS GÉNY, JEAN DABIN and others²

* Commissioned on behalf of the *Comitato Promotore degli Studi in Onore di SS. Giovanni Paolo II in Occasione del XXV Anno di Pontificato* by Massimo Vari, Vice-Chairman Emeritus of the Constitutional Court of Italy, the first—short—version of the paper was originally published as ‘Les buts et les moyens en droit’ in *Giovanni Paolo II Le vie della giustizia: Itinerari per il terzo millennio* (Omaggio dei giuristi a Sua Santità nel XXV anno di pontificato) a cura di Aldo Loiodice e Massimo Vari (Roma: Bardi Editore e Libreria Editrice Vaticana 2003), pp. 71–75, reproduced as ‘Responsabilité et moralité, ou les buts et les moyens en droit’ in [Universitatea „Petru Maior” din Târgu-Mureș Facultatea de Științe Economice, Juridică și Administrative Centrul de Cercetare pentru Drept și Științe Socio-Umane] *Conferința internațională Răspunderea persoanelor juridice în contextul activității de codificare în drept / Conférence internationale La responsabilité de la personne morale dans le contexte de l’activité de codification en droit* (26–28 noiembrie 2009 Sovata) coord. Ioan Sabău-Pop (București: Universul Juridic 2009), pp. 58–63. Later on, presented and published as ‘Goals and Means in Law: or Janus-faced Abstract Rights [Tikslai ir priemonės teisėje]’ in *Jurisprudencija* [Vilnius: Mykolas Romeris Universitetas] (2005) 68(60): Terorizmas ir žmogaus teisės, pp. 5–10 {& <<http://www.mruni.lt/padaliniai/leidyba/jurisprudencija/juris60.pdf>>} and as ‘Goals and Means in Law’ at the STEP Budapest Conference on the Thomistic Understanding of Natural Law as the Foundation of Positive Law in <<http://www.thomasinternational.org/projects/step/conferences/20050712budapest/varga1.htm>>.

¹ Cf., by the author, ‘Chose juridique et réification en droit’ in *Archives de Philosophie du Droit* 25 (Paris: Sirey 1980), pp. 385–411.

² See, e.g., Friedrich Karl von Savigny *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (Heidelberg: Mohr und Zimmer 1814) 162 pp.; by François GénY, *Méthode d’interprétation et sources en droit privé positif* I–II (Paris: Librairie Générale de Droit et de Jurisprudence

that in the course of its application, law can only be actualised as contextualised in one or another setting, by the use of given legal techniques. However, given that *reductio ad infinitum* is impossible, the technique of law-application not only defies further normative definition but enables applications with equal chances in logic that point to expressly opposite and nearly mutually excluding directions.³ Opting for *inclusio* or *exclusio*, *argumentum a simile* or *argumentum e contrario*, *analogia* or the want of it, all while either searching for a basic underlying identity or marking a difference—this is what Civil Law and Common Law justices are used to deciding on at all times in their professional life, whether their legal cultures be based on posited rules, on guiding casual (precedential) decisions or on finding a formula (writ) outlining what and how to proceed. But the answer to their query as to in what way they should act and proceed will be quite simple: they act by following patterns, as long as they can; then, by resorting to their own discretionary decisions, when there is no longer any pattern available to provide guidance.

Therefore, for its practical materialisation law depends to a considerable extent on the mode of selecting out and actualising those technical and interpretive, argumentative and evidentiary means and procedures that are accepted in law to both shape and channel the formation of the judge's final decision, over which the law no longer has control. Because such mediators are wedged in the process, the reifying power of the law returns back into the hands of a person (with relief from personal responsibility no longer possible), who has an equal chance to use or misuse (under-use or over-use) the law, making more or less optimum use, as the case may be, of the heritage of the person's predecessors and his or her own talents.⁴

For this very reason, our theoretical interest in and responsibility for the workings of law can by no means stop at the point where the law has been posited. Just as "law in books" [somewhat as a *Ding an sich*] becomes tangi-

1899) and, particularly, *Science et technique en droit privé positif* I–IV (Paris: Sirey 1914–1921); by Jean Dabin, *La théorie générale du droit* (Bruxelles: Émile Bruylant 1944) viii + 276 pp., especially Part II: «La méthode juridique», pp. 97–203 and *La technique de l'élaboration du droit positif* spécialement du droit privé (Bruxelles: Bruylant & Paris: Sirey 1935) xii + 367 pp.

³ Cf. Csaba Varga & József Szájer 'Legal technique' in *Rechtskultur – Denkkultur* Ergebnisse des ungarisch-österreichischen Symposiums der Internationalen Vereinigung für Rechts- und Sozialphilosophie 1987, hrsg. Erhard Mock & Csaba Varga (Stuttgart: Franz Steiner Verlag Wiesbaden 1989), pp. 136–147 [Archiv für Rechts- und Sozialphilosophie, Beiheft 35].

⁴ Cf., by the author, *Lectures on the Paradigms of Legal Thinking* (Budapest: Akadémiai Kiadó 1999) vii + 279 pp. [Philosophiae Iuris].

ble for us [as a *Ding für uns*] in the reality of the “law in action”,⁵ law cannot be considered other than a process. And taken as a p r o c e s s , law works as a function of its environment and can only be assessed through its c o n - d i t i o n i n g a n d c o n t e x t u a l i s i n g c u l t u r e .⁶

2. JOHN PAUL II

2.1. On Personhood, his/her Goods, and Law

The philosophy placing the person in the centre, as formulated by Supreme Pontiff JOHN PAUL II during His earlier philosopher’s life in Poland and which has now become integrated within the social teaching of the Church,⁷ reflects methodologically similar insights regarding institutional operations in general. Notably,

“[m]an cannot relinquish himself or the place in the visible world that belongs to him; he cannot become the slave of things, the slave of economic systems, the slave of production, the slave of his own products. A civilization purely materialistic in outline condemns man to such slavery”,

the more so because

“[w]hat is in question is the advancement of persons, not just the multiplying of things that people can use. It is a matter [...] not so much of »having more« as of »being more«.”⁸

⁵ As the announcement of the American sociological jurisprudence, this is the conceptual differentiation proposed by Roscoe Pound in his ‘Law in Books and Law in Action’ *American Law Review* 44 (1910) 1, pp. 12–36 and further developed in his *Jurisprudence* IV (St. Paul 1959), pp. 14 (and, as applied to practical issues, in III, pp. 362 et seq.).

⁶ Cf., by the author, *A jog mint folyamat* [Law as process] (Budapest: Osiris 1999) 430 pp. [Osiris könyvtár: Jog].

⁷ For his phenomenological personalism, see, from Karol Wojtyła, ‘The Acting Person’ [1969] *Analecta Husserliana* X (1979), ‘The Person: Subject and Community’ [1976] *Review of Metaphysics* 33 (1979), pp. 273–308 {‘La persona: soggetto e comunità’ *Il Nuovo Areopago* 5 (1986) 4}, ‘Participation or Alienation’ *Analecta Husserliana* VI (1977), ‘Transcendence of the Person in Action and Man’s Self-teleology’ *Analecta Husserliana* 9 (1979); and, as collected, his *Person and Community* Selected Essays, trans. Theresa Sandok (New York: P. Lang 1993) xvi + 370 pp. and *Perchè l’uomo* Scritti inediti di antropologia e filosofia (Milano: Leonardo 1995) 320 pp. For an essayistic outline of his legal considerations and their philosophical foundations, see Zenon Grocholewski *La filosofia del diritto di Giovanni Paolo II* (Roma: Editrice Falma Edium 2002). Cf. <<http://campus.udayton.edu/mary/resources/jpbibidx.html>> for a bibliography.

⁸ *Redemptor hominis* (March 4, 1979), 16b & 16d.

And it is humankind at all times who bears responsibility for all this, which each individual may not shift in the least to human-created institutions, superstructure or society. No given arrangement of human communities or associations is to be taken as a purpose in and for itself. Human creations are not to be used as a self-justification either. We have to be aware that

“[h]uman rights and the rights of God go hand in hand.”⁹

All our catch-words alongside and standing for the institutions constructed by humans are fruits of humankind’s striving for good, of humankind’s struggles and partial successes to the extent that humankind has indeed every reason to protect the products of their efforts. However, the significance of all such fruits cannot lie in themselves but exclusively in the values they may assist to implement. Humankind’s ultimate evangelical purpose is not just to devise instruments but to properly serve the human personality and its unalienable dignity here on Earth, through developing the suitable media to care for them. To quote just one example,

“[i]n fact, democracy itself is a means and not an end, and »the value of a democracy stands or falls with the values which it embodies and promotes«.”¹⁰

This same relationship between goals and means (with the latter necessarily subordinated to the former) also arises in connection with the evaluation of world-wide integration into one unity, as one of the main tendencies underlying our age and determining our future. For instance,

“[g]lobalization, *a priori*, is neither good nor bad. It will be what people make of it. No system is an end in itself, and it is necessary to insist

⁹ “*Und doch gehören Menschenrechte und Gottesrechte zusammen.*” In ‘*Commentarium Officiale: Acta Ioannis Pauli Pp II’ Acta Apostolicae Sedis* 80 (1988), p. 323.

¹⁰ ‘Message of the Holy Father’ in *Democracy Reality and Responsibility* [The Proceedings of the Sixth Plenary Session of the Pontifical Academy of Social Sciences, 23–26 February 2000] ed. Hans F. Zacher (Vatican City 2001) xxxviii + 422 pp. [Pontificiae Academiae Scientiarum Socialium Acta 6] {& <http://www.vatican.va/roman_curia/pontifical_academies/acdscien/documents/acta6%282of4%29.pdf>}, p. xxxvi, quoting *Evangelium Vitae* (March 25, 1995), 70. As continued by R. Minnerath—‘Le développement de la démocratie et la doctrine sociale de l’Église’ in *ibid.* p. 416—, “Democracy in itself [...] is not a supreme value. [...] There are universal values inherent in the human substance about which no majority is entitled to decide on.”

that globalization, like any other system, must be at the service of the human person; it must serve solidarity and the common good.”¹¹

Obviously, if “globalization is ruled merely by the laws of the market applied to suit the powerful, the consequences cannot but be negative.”¹² The outcome seems evident if, as illustrated by the Papal examples, the effect of globalisation manifests itself in

“absolutizing the economy, unemployment, the reduction and deterioration of public services, the destruction of the environment and natural resources, the growing distance between rich and poor, unfair competition which puts the poor nations in a situation of ever increasing inferiority.”¹³

No institution is, therefore, innocent by itself and no institution carries its value alone in itself. The service of humans can be the only reason for institutional existence, in the sense that

“the person in the community [...] must, as a fundamental factor in the common good, constitute the essential criterion for all programmes, systems and regimes.”¹⁴

Searching even deeper for the core of the “internal need” or “interior demand of the human being”,¹⁵ at the service of which human efforts shall be aimed, we inevitably arrive at the realm of values: values that we ourselves have to reveal and identify in the created world (based on our own culture, experienced and continuously improved), helping us orient ourselves in the

¹¹ ‘Address of the Holy Father’ in *Globalization Ethical and Institutional Concern* [Proceedings, Seventh Plenary Session, 25–28 April 2001] ed. Edmond Malinvaud & Louis Sabourin (Vatican City 2001), p. 28 [The Pontifical Academy of Social Sciences, Acta 7].

¹² Pope John Paul II in *Ecclesia in America* (January 22, 1999), 20, quoted by Diarmuid Martin ‘Globalization in the Social Teaching of the Church’ in *The Social Dimensions of Globalisation* [Proceedings of the Workshop on Globalisation, 21–22 February 2000] ed. Louis Sabourin (Ex Aedibus Academicis in Civitate Vaticana: MM) 93 pp. [Pontificiae Academiae Scientiarum Socialium, Miscellanea 2] {& <http://www.vatican.va/roman_curia/pontifical_academies/acdsoc/documents/miscellanea2.pdf>}, pp. 82–93 on p. 86.

¹³ *Ibid.*

¹⁴ *Redemptor hominis* [note 8], 17d.

¹⁵ Joseph Ratzinger *Crises of Law* [the Cardinal’s address, as a newly awarded honorary doctor, to the Faculty of Law of LUMSA (Rome, 10 November, 1999)] <www.zenit.org/english/archive/documents/crises-of-law.html>.

world, within the framework of which we cogitate and act, by giving an account of our existence as humans. All this testifies to an unchallengeable priority amongst values. In terms of this, we can agree that

“[e]thics demands that systems be attuned to the needs of man, and not that man be sacrificed for the sake of the system. [...] Globalization must not be a new version of colonialism. It must respect the diversity of cultures which [...] are life’s interpretive keys”.

Aware of some contemporary threats, the Pope asserted that the desirable outcome is

“not [...] a single dominant socio-economic system or culture which would impose its values and its criteria on ethical reasoning”, “not [...] absolute relativization of values and the homogenization of lifestyles and cultures”.¹⁶

It is the person’s decision about his own life with respect to the principle of subsidiarity that is absolutely vital. And this also involves respect for the levels of human decision making for that sovereignty that can be realised on both an individual and a state-level plane.

“The essential sense of the State, as a political community, consists in that the society and people composing it are master and sovereign of their own destiny. This sense remains unrealized if, instead of the exercise of power with the moral participation of the society or people, what we see is the imposition of power by a certain group upon all the other members of the society.”¹⁷

In the light of such a teaching, even the achievements of several centuries of our Euro-Atlantic development, which are usually taken for granted just as

¹⁶ ‘Address of the Holy Father’ in *Globalization* [note 11], p. 29. As an American author—Thomas L. Friedman *The Lexus and the Olive Tree* [New York: Farrar, Straus & Giroux 1999] rev. ed. (2000) xxi + 469 pp. at p. 302, quoted by Mary Ann Glendon ‘Meeting the Challenges of Globalization’ in *ibid.* [note 11], p. 338—continues, “You cannot build an emerging society [...] if you are simultaneously destroying the cultural foundations that cement your society and give it the self-confidence and cohesion to interact properly with the world [...]. For without a sustainable culture there is no sustainable community and without a sustainable community there is no sustainable globalization.”

¹⁷ *Redemptor Hominis* [note 8].

democracy, parliamentarism and human rights are,¹⁸ can in themselves hardly be conceived of as anything more than faceless techniques. Or, they are nothing but neutral instruments *in se* and *per se*, carrying values exclusively through the realisation of goals they had once been invented to serve.¹⁹ Yet, providing that this is the case, they can only be taken as universal as abstract potentialities, for only the depth to which they actually fill their roles under *hic et nunc* given conditions may eventually qualify their concrete materialisation as good, beneficial or exemplary. Whether our duty is to operate or to develop them, as may be required at any given time, we must not forget that they are only justifiable to the extent they encourage the development of the person directly or indirectly.²⁰

We have to be aware of the fact that none of them does prevail by itself as part of nature or as an entity destined from the outset to shape human lives. For instance,

“[d]emocracy, as an idea as well as a practice, does not come by itself; it is neither an intellectual evidence nor a spontaneous behavior. On the contrary [...]”²¹

¹⁸ Cf., e.g., Giorgio Filibeck *Human Rights in the Teaching of the Church* From John XXIII to John Paul II (Vatican City: Libreria Editrice Vaticana 1994) 494 pp. [Pontifical Council for Justice and Peace / International Federation of Catholic Universities] and *Human Rights and the Pastoral Mission of the Church* (World Congress on the Pastoral Promotion of Human Rights, Rome, July 1998) (Rome 2000) 80 pp.

¹⁹ See, e.g., *Democracy Some Acute Questions* [The Proceedings of the Fourth Plenary Session of the Pontifical Academy of Social Sciences, 22–25 April 1998] ed. Hans F. Zacher (Vatican City 1999) 450 pp. [Pontificiae Academiae Scientiarum Socialium Acta 4] {& <http://www.vatican.va/roman_curia/pontifical_academies/acdscien/documents/acta4%281of3%29.pdf>} and *Democracy Reality and Responsibility* [note 10].

²⁰ Cf., by the author, ‘Rule of Law – at the Crossroads of Challenges’ *Iustum, Aequum, Salutare* [Budapest] I (2005) 1–2, pp. 73–88 {& <<http://www.jak.ppke.hu/hir/ias/20051sz/20051.pdf>>} as well as in *Legal and Political Aspects of the Contemporary World* ed. Mamoru Sadakata (Nagoya: Center for Asian Legal Exchange, Graduate School, Nagoya University 2007), pp. 167–188 & as ‘Rule of Law: Challenges with Crossroads Offered’ *Central European Political Science Review* 10 (2009) Spring, No. 35, pp. 42–68}.

²¹ René Rémond ‘Democracy in Western Europe’ in *Democracy* [Proceedings of the Workshop, 12–13 December 1996] ed. Hans F. Zacher (Ec Aidubvs Academicis in Civitate Vaticana: MCMXCVIII), p. 52 [Pontificiae Academiae Scientiarum Socialium, Miscellanea 1] {& <http://www.vatican.va/roman_curia/pontifical_academies/acdscien/documents/DEMOCRACY.pdf>}.

That is, all these are artificial human constructions,²² skills developed through the constantly controlled experience accumulated through generations,²³ sustained and substantiated by the unceasing human effort at socialisation, re-generation and re-conventionalisation.

2.2. *On Person, Family, and Nation*

Examining the lessons drawn from anthropology in the perspective of the history of philosophy,²⁴ we may arrive at a reconstruction according to which the *person* (including his or her personality and individuality) can only develop in human history as conditioned by forms of association that are indispensable for the biological as well as the social reproduction of humankind, known—in want of better identification—as *family* as well as *nation*. The person, his or her family and nation: these are the basic constituents to be taken as axiomatic foundations, successively building upon one another as balanced in their mutual preconditioning and support. Therefore, no external limitation (even in the name of such usually absolutised human values as freedom and self-determination) can be imposed upon and to the detriment of any of them. In consequence, any other specifically human value is thus reflexive upon and instrumental to them—in function of the optimum development of the person and his or her family and nation.²⁵

Obviously, family and nation, as media for humans' societal reproduction, are instrumental for the person to develop with dignity realised.

²² For the first use of the term 'künstliche menschliche Konstruktion', see Georg Klaus *Einführung in die formale Logik* (Berlin[-East]: Deutsche Verlag der Wissenschaften 1959) xii + 391 pp.

²³ The Pope himself (in his message to the 4th plenary session of the Vatican's Academy of Social Sciences convened in 1998 to discuss *Democracy Some Acute Questions* [note 19]: 'Address of the Holy Father', p. 26) refers to *Centesimus annus* (May 1, 1991), 43, in terms of which "The Church has no models to present; models that are real and truly effective can only arise within the framework of different historical situations, through the efforts of all those who responsibly confront concrete problems in all their social, economic, political and cultural aspects, as these interact with one another."

²⁴ Cf. János Goják 'Az európai értékrend antropológiai alapjai' [The anthropological foundations of the European order of values] [lecture delivered at the international Conference organised in Budapest on March 7, 2003 by the Committee *Justitia et Pax* of the Hungarian Bishops' Conference on *European values and the European Constitution in Making*]. Cf. also *Laborem exercens* (14 September, 1981), 10, 6d & 3b.

²⁵ Cf., by the author, 'Önmagát felemelő ember? Korunk racionalizmusának dilemmái' [Man elevating himself? Dilemmas of rationalism in our age] in *Sodródó emberiség* [Mankind adrift: on the work of Nándor Várkonyi's »The Fifth Man«] ed. Katalin Mezey (Budapest: Széphalom 2000), pp. 61–93.

Human rights, fundamental freedoms as well as the legal values of freedom and self-determination are instrumental to the former.²⁶ Finally, the values of legal formalism such as legal security, equality before the law and the law's foreseeability are instrumental as merely formal mediatory values to all the above foundational values.

Thus, the purport of institutional operation is necessarily more than the destiny of itself; therefore, it cannot be controlled, qualified or justified merely by reference to and in terms of its institutional constitution. Observance of a set of rules defining an institutional operation in its formalised homogeneity is only sufficient for the operation in question to be qualified as complying with its own rules but not for anything more or other than this. No doubt, institutions are expected to operate regularly. However, certainly they have not been established for the very purpose of being regular for their own sake (so to speak, in a *l'art pour l'art* way). On the whole, something far more is at stake here than the idea suggested by "the doctrine of the supremacy of the greater number, and that all right and all duty reside in the majority".²⁷ For "[t]he imperium of truth is not and cannot be democratic."²⁸ Each and every institution points beyond its own self. "Democracy does not itself introduce values, nor does democracy itself produce values. It mediates between values."²⁹ The institution is intermediary in assisting to implement imported values in their respectively professional homogenised fields.

Thus, institutional existence cannot be taken as a totality, sufficient in itself. Its homogenised operation is intended exclusively to maximise its instrumental efficiency. However, there is a price to be paid for this. For the

²⁶ One of the reasons why the Emeritus Professor of Demography at the Catholic University of Leuven, MICHAEL SCHOOLYANS, considers the decisive influence upon our global planning by the New Age secular ideologists under the United Nations' aegis even more threatening than the classical revolutionism of one-time MARXists, is because the former, running against the spirit of the Universal Declaration of Human Rights (1948), make the fate of the world and, in it, the unalienable dignity of the human person as well, a mere function of a mass of majoritarian decisions taken by unequal parties who impose their will on other nations as a kind of world-government, to the detriment of the principle of subsidiarity. See, e.g., 'Globalization's Dark Side' *Inside the Vatican* (October 2001), and—as an archiepiscopal stand—Elden F. Curtiss 'United Nations Population Management' *Social Justice Review* (May–June 2002) in <<http://perso.infonie.be/le.feu/ms/divag/rcdag.htm>>.

²⁷ Leo XIII *Libertas Praestantissimum* (June 20, 1888).

²⁸ Habib C. Malik 'Democracy and Religious Communities: The Riddle of Pluralism' in *Democracy Reality and Responsibility* [note 10], p. 372.

²⁹ Hans F. Zacher 'Democracy: Common Questions' in *ibid.* [note 10], p. 134.

institution as such will be dependent on external factors and, if having gotten into improper hands or under the influence of the attraction of improper intentions, it may become exposed to all kinds of uncontrollable powers. This is the underlying reason why the Social Teaching of the Catholic Church has to emphasise that

“if there is no ultimate truth to guide and direct political activity, then ideas and convictions can easily be manipulated for reasons of power. As history demonstrates, a democracy without values easily turns into open or thinly disguised totalitarianism.”³⁰

Consequently, the human person (endowed with personal faith, conscience, values and conviction) is at the focus of all activity. There is no need to add that personal responsibility with an ethos of moral commitment and a predisposition for re-consideration (in adapting and responding to new challenges) is a *sine qua non* part of the scheme.³¹

3. Artificiality and Antithetical Developments in Law

Approaching legal dilemmas with such sensitivity, we can see that due to inherent polarities arising from the law's sharpened formalism, the development of legal thought (both in judicial practice and legal scholarship) often takes place through generating (positing) in-themselves utterly artificial antithetical concepts that may then abruptly switch over into one another. The conflicts, for instance, of SHAMMAÏ and HILLEL in classical Jewish law or of the Proculians and the Sabinians (following LABEO and CAPITO, respectively) in Roman law equally illustrate the collision of form and contents with their emphasis on either strictness as to

³⁰ *Centesimus Annus* [note 23], 46.

³¹ The following remark emerges in this context: “The principle of democracy excludes that any power—whether it be of rule or of fact—dominates over the others. Yet today democracy is threatened by the hegemony of two powers: that of the media and that of the judges. A reflection is necessary to define the parameters, the limits and the competence of each one.” Rémond, op. cit. in *Democracy* [note 21], p. 49. For not even “the role played by the constitutional courts is [...] without its problems. Their democratic legitimation is as a rule less obvious than the democratic legitimation of parliament [...]. It depends very largely on the credibility with which the constitutional courts base their decisions on the constitution, if decisions with which they oppose the authority of the legislature or indeed of the government are not to imperil democracy or the constitutional court itself.” Zacher, op. cit. in *ibid.* [note 21], p. 127.

being tied to the text, that is, to past dead wordings, independent of consequences, on the one hand, or the l i v e a b i l i t y of the entire regulatory arrangement in order to realise the originally contemplated goals, on the other.³² Moreover, listing another example from the tragic recent past of 20th-century European history, the controversy between HANS KELSEN and CARL SCHMITT during the Weimar crisis can—apart from their positions being thoroughly twisted under the constraint of conditions—also be construed as the (equally dangerous, if taken as exclusive) alternative of either a purely f o r m a l p r o c e d u r a l i t y justifying any result (perhaps destroying even the last chance of national advancement) from the outset or a s u b s t a n t i v i t y calling for a final sovereign decision, with the expectation of being able to reach the underlying goal eventually.³³ Or, the conditional acceptance of formal requirements of law when making a decision in the name of the law, that is, the justification of procedurally defined paths and substantively determined conclusions exclusively as a function of their suitability for achieving the actual purpose (while searching for the mutuality of satisfactory balances instead of the one-sidedness of exclusivities), is all but a new recognition in the history of legal thought.³⁴ This is what presents the application of any norm in the context of pondering be-

³² See, above all, Chaïm Perelman 'Legal Ontology and Legal Reasoning' *Israel Law Review* 16 (1981) 3, pp. 356–367 and Peter Stein 'Logic and Experience in Roman and Common Law' *Boston University Law Review* 59 (1979) 3, pp. 433–451 {reprinted in *Comparative Legal Cultures* ed. Csaba Varga (Aldershot, Hong Kong, Singapore, Sydney: Dartmouth & New York: The New York University Press 1992) xxiv + 614 pp. [The International Library of Essays in Law & Legal Theory, Legal Cultures 1], pp. 363 et seq. et 333 et seq., respectively}.

³³ Cf., by the author, 'Change of Paradigms in Legal Reconstruction (Carl Schmitt and the Temptation to Finally Reach a Synthesis)' in *Perspectives on Jurisprudence* Essays in Honor of Jes Bjarup, ed. Peter Wahlgren (Stockholm: Stockholm Institute for Scandinavian Law 2005) [= *Scandinavian Studies in Law* 48], pp. 517–529 {& *Rivista internazionale di Filosofia del Diritto* LXXXI (ottobre / dicembre 2004) 4, pp. 691–707}.

³⁴ It is the mutuality of balances that, e.g., recent Lithuanian scholarship, critical about the present direction taken by the actual course of their transition to the rule of law, is looking for nowadays both in the pre-assumption of social solidarity and—as is also to be expressed in the law's technicised homogeneity—of a balance between rights and duties as a *sine qua non* for law and order under the rule of the law. Cf., by the author, 'Rule of Law between the Scylla of Patterns and the Charybdis of Realisations (The Experience of Lithuania)' *Acta Juridica Hungarica* 46 (2005) 1–2, pp. 10–29 {& <<http://www.akademiai.com/media/37knultrmmv9b6ykp7/contributions/m/3/2/9/m3296v37841w54h0.pdf>> & <<http://www.akademiai.com/content/m3296v37841w54h0/fulltext.pdf>>, as well as *Rechtstheorie* 37 (2006) 3, pp. 349–359 & as 'In Want of New Balances in Transition: Lithuania Searching for Its Own Path' *Central European Political Science Review* 9 (2008), No. 34, pp. 94–107}.

tween the goods to be protected and the goals to be achieved, just as JESUS CHRIST did, when He declared, as against the Pharisean interpretation of the Sabbath's law: "So it is lawful to do good on the sabbath".³⁵

The dramatic self-transcendence by GUSTAV RADBRUCH—who had to realise on the ruin of the Third Reich that his earlier dedication to security in (accompanied by foreseeability of) the law might destruct the basic need for justice; moreover, it might also leave the damages caused by crying injustice both unremedied and unremediable in the law³⁶—served as an empirical proof for him and for all of us that any one-sidedness (no matter how eternal and guaranteed the human principles involved may seem) may have a destructive impact upon law. The solution is obviously not just stumbling about between the extremes but pondering upon the ancient Roman wisdom. That is, conceiving of law as both craftsmanship and arts, i.e., 'ars'

The papal instructions are quite clear on this issue, too. "For each of these rights, there is a corresponding duty, and We proclaim the duties with equal force and clarity—Pope Paul VI told on April 11, 1976 [*Message of the Holy Father for the 1976 World Social Communications Day*]—, for to give the rights predominance over the duties would be to provoke an imbalance, which would be reflected in a damaging way in social life. It must be remembered that the reciprocity between rights and duties is an essential thing; the one springs from the other, and vice versa." <http://www.vatican.va/holy_father/paul_vi/messages/communications/documents/hf_p-vi_mes_19760411_x-com-day_en.html>. "Every individual has the obligation—Pope John Paul II went on on December 2, 1978 [*Message for the 30th anniversary of the Universal Declaration of Human Rights*]—to exercise his basic rights in a responsible and ethically justified manner."

³⁵ Matthew 12:12 in *The New American Bible* Cf. also Peter Noll *Jesús und das Gesetz* Rechtliche Analyse der Normenkritik in der Lehre Jesu (Tübingen: Mohr 1968) 30 pp. [Sammlung gemeinverständlicher Vorträge und Schriften aus dem Gebiet der Theologie und Religionsgeschichte 253] on p. 11.

³⁶ Cf. Gustav Radbruch 'Gesetzliches Unrecht und übergesetzliches Recht' *Süddeutsche Juristen-Zeitung* (1946), No. 5, pp. 105–108. For the theoretical background, see Zoltán Péteri 'Gustav Radbruch und einige Fragen der relativistischen Rechtsphilosophie' *Acta Juridica Academiae Scientiarum Hungaricae* II (1960) 1–2, pp. 113–160. For a present-day re-consideration, cf., among others, B. Schumacher *Rezeption und Kritik der Radbruchschen Formel* [Diss.] (Göttingen 1985); Walter Ott 'Die Radbruch'sche Formel: Pro und Contra' *Zeitschrift für Schweizerisches Recht* 107 (1988), pp. 335 et seq.; Arthur Kaufmann 'Die Radbruchsche Formel vom gesetzlichen Unrecht und vom übergesetzlichen Recht in der Diskussion um das im Namen der DDR begangene Unrecht' *Neue Juristische Wochenschrift* 48 (1995), pp. 81 et seq.; Horst Dreier 'Die Radbruchsche Formel – Erkenntnis oder Bekenntnis' in *Staatsrecht in Theorie und Praxis* Festschrift für Robert Walter zum 60. Geburtstag, hrsg. H. Mayer (Wien: Manz 1991), pp. 117–135; Stefan Talmon 'The Radbruch Formula: Legal Injustice and Supra-legal Justice' *ELSA Law Review* II (Winter 1991) 1, pp. 17–30; Stanley L. Paulson 'Radbruch on Unjust Laws: Competing Earlier and Later Views?' *Oxford Journal of Legal Studies* 15 (1995) 3, pp. 489–500; Horst Dreier 'Gustav Radbruch und die Mauerschützen' *Juristen-zeitung* 52 (1997), pp. 421 et seq.; Robert Alexy 'A Defence of Radbruch's Formula' in *Recraft-*

in Latin, presents law in a state of equilibrium from the very beginning, in which both the questions of “wherefrom?” and “along what standards?” to initiate reasoning as well as those of “where to?” and “arriving at what result?” to channel reasoning are of complementary and equal importance.³⁷ After all, reasoning started from somewhere has to be channelled in a considered and continuously re-considered perspective.

In fact, consciousness of the genuine service of legal technique in law may help us to realise increasingly in everyday practice such a continuous mediation, pondering and balancing on and amongst various aspects, values and interests with the subordination of all kinds of institutional operations (and their inherent striving for alienation) to the service of the cause of the person, family and nation as a community home.

ing the Rule of Law The Limits of Legal Order, ed. David Dyzenhaus (Oxford & Portland [Oregon]: Hart Publishing 1999), pp. 15–39. Cf. also Rudolf Geiger ‘The German Border Guard Cases and International Human Rights’ *European Journal of International Law* 9 (1998), pp. 540–549, especially para B.2, pp. 544–545. Cf., as a summary, <http://de.wikipedia.org/wiki/Radbruchsche_Formel>.

³⁷ Cf., by the author, ‘Doctrine and Technique in Law’ *Iustum Aequum Salutare* IV (2008) 1, pp. 23–37 {& <<http://www.jak.ppke.hu/hir/ias/20081sz/02.pdf>>, as well as in <www.univie.ac.at/RI/IRIS2004/ArbeitspapierIn/Publikationsfreigabe/Csaba_Phil.doc>.

LAW, ETHICS, ECONOMY Independent Paths or Shared Ways?*

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1. “Cynical Acid” in the Foundation of Modern Formal Law

Justice OLIVER WENDELL HOLMES of the Supreme Court of the United States, in one of the classics of the formative years of American legal realism, defined his programmatic stand almost one hundred and twenty years ago as follows: legal notions have to be washed with “cynical acid” so that they can serve as genuinely legal concepts, stripped of theological and moral (etc.) overtones.¹ Because, as he saw it,

“[m]oral predilections must not be allowed to influence our minds in settling legal distinctions”.²

Thus the question arises: is someone calling for cynicism inevitably cynical himself?

We know that such approach was called *functionalism* at that time. It held as a basic tenet that each and every component of the social complex has to serve with full strength in its own place, as it is just its specific particularity as distinguished from anything else that may have motivated its coming into a separate existence.

* In its first version in Hungarian, in *Placet experiri* Ünnepi tanulmányok Bánrévy Gábor 75. születésnapjára [Essays in honour of Gábor Bánrévy on the occasion of his 75th birthday] ed. Katalin Raffai (Budapest: [Print Trade] 2004), pp. 338–348, presented in English at the Saint Thomas Education Project Workshop in Barcelona in September 2005 & in <<http://www.thomasinternational.org/projects/step/conferences/20050920barcelona/varga1.htm>> & reprinted in *Law, Liberty, Morality and Rights* ed. Tomasz Gizbert-Studnicki (Warszawa: Wolters Kluwer Polska OFYCINA), pp. 239–250.

¹ Oliver Wendell Holmes ‘The Path of the Law’ [1897] in his *Collected Legal Papers* (New York: Harcourt, Brace & Co. 1920), pp. 167–202 on p. 174.

² O.W. Holmes *The Common Law* (London: Macmillan & Cambridge, Mass.: Wilson 1882) xvi + 422 pp. at p. 148.

It is the ideal of functionalism in law, for which modern formal law was invented and developed to institutionalise. Historically, this was the product of the European bureaucratism (which gained strength from the early 19th century) that began to assimilate the state structure to its organisatory needs with a previously unheard-of efficiency. As its first step, law was thoroughly formalised to develop its particular homogeneity. In return,

- law became a u t o n o m o u s
- with d i s t i n g u i s h e d particularity³
- to function in a s p e c i f i c way. This necessitated its own responsibility in overall co-operation, with interactions in any direction regarding any complex.⁴

Thereby, functionalism is also expressive of an i n s t r u m e n t a l t e n - d e n c y, which is a theoretical conclusion of the fact that, from now on, modern social existence can only be explained as the self-realisation of straightforward co-operation of partial totalities, relatively separated yet thoroughly connected on the plane of the whole totality. This is what GEORGE LUKÁCS and his circle once described as the domination of homogeneous autonomies developed on the terrain of undivided heterogeneity emerging in everyday existence, in which each and every complex (which has separated out from the total complex by advancing its particularities) becomes both specified and, operating according to its own criteria as one given h o m o - g e n e i t y, relatively independent from the total complex (while facing the risk of confrontation).⁵ On the field of macro-sociological theory-building, NIKLAS LUHMANN, too, arrived at a similar conclusion one decade later, formulating the category of *Ausdifferenzierung* as a theoretical foundation stone, to indicate separation and isolation, in the course of which the

³ For the qualifying term “distinctively legal”, see Philip Selznick ‘The Sociology of Law’ in *International Encyclopaedia of the Social Sciences* ed. David L. Sills (New York: The Macmillan Company & The Free Press 1968), p. 51.

⁴ Cf., by the author, ‘Moderne Staatlichkeit und modernes formales Rechts’ *Acta Juridica Academiae Scientiarum Hungaricae* 26 (1984) 1–2, pp. 235–241.

⁵ In George Lukács’ philosophical elaboration of an initially aesthetical origin, see *Über die Besonderheit als Kategorie der Ästhetik* (Neuwien am Rhein & Berlin: Luchterhand 1967) 402 pp., ‘Über die Besonderheit als Kategorie der Ästhetik’ [1957] in his *Probleme der Ästhetik* (Neuwied & Berlin: Luchterhand 1969), pp. 537 et seq., *Die Eigenart des Ästhetischen* 1–2 (Neuwied am Rhein & Berlin-Spandau: Luchterhand 1963) as well as *Zur Ontologie des gesellschaftlichen Seins* hrsg. Frank Benseler (Darmstadt: Luchterhand 1984–1986) [Werke 13–14] and, from the circle of disciples, Ágnes Heller *Everyday Life* trans. G. L. Campbell (London: Routledge & Kegan Paul 1984) xii + 276 pp.

specific operation of law would appear with a binary code, responding with the exclusive alternative of either 'lawful' or 'unlawful'.⁶

All this anticipated the chance of dysfunctionality in actual operation, running against the values originally designed to be implemented. For, as has been long known, scholarship has considered such occurrences to be mere mistakes, marginal in practice.⁷ At the same time, however, theoretical description has defined the ontological result by some *mutuality in operation*, forming a "tendential unity", which is a *sine qua non* of the operability of—and, as such, will at any time determine—the total whole. This LUKÁCSian recognition is also expressed by the fact that in his social ontology, language and law are from the outset distinguished from the rest of the complexes of social being (taken as the total operation of the total complex consisting of partial complexes). Or, language and law are held to be mere intermediators that do not operate with their own values, for they exclusively mediate among values taken from other (non-mediatory) complexes. By the help of instrumental values, they may operate as wedged in the process, at most strengthening the efficiency of their mediatory role. Of course, inspired by historical materialism rooted in economic determinism, LUKÁCS presumed a component able to play an over-dominant role in the total process *hic et nunc*. But having arrived at social ontology from Bolshevik revolutionism, the aged LUKÁCS had already realised that hegemonic determination through any complex becoming totally dominant (e.g., the economy in general, or politics in transitory or pathological states, in the shadow of which no further partial complex could any longer play the proper role to be played) would inevitably harm and distort the whole totality.⁸

⁶ From Niklas Luhmann, e.g., *Ausdifferenzierung des Rechts* Beiträge zur Rechtssoziologie und Rechtstheorie (Frankfurt am Main: Suhrkamp 1981) 458 pp.

⁷ It is by far not a mere chance that MARXISM was the first in the modern age to develop a theory of alienation, addressing it as a core issue of social scientific thought. Cf., among others, Joachim Israel *Alienation From Marx to Modern Sociology* (A Macrosociological Analysis) (Atlantic Highlands, N.J.: Humanities Press 1979) x + 358 pp. as well as, from the present author, 'Chose juridique et réification en droit' in *Archives de Philosophie du Droit* 25 (Paris: Sirey 1980), pp. 385–411 and '«Thing» and Reification in Law' in his *The Place of Law in Lukács' World Concept* (Budapest: Akadémiai Kiadó 1985, ²1998), Appendix, pp. 160–184.

⁸ Cf., by the author, 'Towards the Ontological Foundation of Law (Some Theses on the Basis of Lukács' Ontology)' *Rivista Internazionale di Filosofia del Diritto* LX (1983) 1, pp. 127–142 {& in *Filosofia del Derecho y Problemas de Filosofía Social* X, coord. José Luis Curiel B. (México: Universidad Nacional Autónoma de México 1984), pp. 203–216 [Instituto de Investigaciones Jurídicas, Serie G, Estudios doctrinales, Núm. 81] [also available as <<http://www.bibliojuridica.org/libros/3/1051/20.pdf>>]} as well as 'Autonomy and Instrumentality

2. Example: Perspectives for Curing Malpractice in Law

Let us raise the question: what practices may arise in our day from such and similar recognitions? If we consider only the alternatives of medical law, i.e., of making malpractice a subject of civil action, one of the three solutions that follow may emerge in principle:

- no responsibility and no justiciability in practice (as was once practised in the “actually existing system of socialism” in Hungary and the entire region);
- responsibility made almost absolute (as evolved as a result of the self-assertion of lawyering in the United States of America);
- personal or institutional responsibility enforceable via specific media made up by the medico-legal profession (idealised as a perspective for Hungary after the fall of Communism).

Well, assessing the field from such extreme poles (with some sensitivity to our domestic traditions⁹) within such a threefold perspective of past, present, and possible future, we can take the following consequences into account in light of today’s procedures and of prospects they will become further Americanised:

- (1) the assumption of responsibility enforced by lawsuits will be built as an auxiliary cost into the expenses of health care, which must result in the overall rise in its budget;
- (2) the actual accrual of health costs will be taken from the proper field of health care, only to be divided among suing clients and the lawyerly caste; in response to which

of Law in a Superstructural Perspective’ *Acta Juridica Hungarica* 40 (1999) 3–4, pp. 213–235.

⁹ A balanced middle-of-the-road stand is presented by, e.g., Erzsébet Kapocsi ‘Az orvosi hivatal autonómiájának etikai vonatkozásai’ [Ethical aspects of the autonomy of the medical profession] *Lege Artis Medicinae* 10 (2000) 4, pp. 358–364. Cf. also Ervin Kövesi ‘Orvosi etika és gazdaságosság – összefüggés-e vagy ellentmondás?’ [Medical ethics and economicalness: are they in correlation or contradiction?] *Valóság* 39 (1996) 9, pp. 26–29, Ágnes Dósa ‘Felelősség vagy biztosítás?’ [Liability or insurance?] *Lege Artis Medicinae* 6 (1996) 3–4, pp. 262–265 as well as Péter Balázs ‘Orvosi etika és gazdasági realitások’ [Medical ethics and economic facts] *Valóság* 40 (1997) 4, pp. 16–28. For an international background, see also Hans-Heinrich Hennekeuser ‘Zwischen Ethik und Wirtschaftlichkeitsgebot: Der leitende Krankenhausarzt im Spannungsfeld von Patientenbetreuung und Ökonomie’ in *Jahrbuch für Wissenschaft und Ethik* 3 (Berlin & New York: de Gruyter 1998), pp. 141–147. As a Hungarian legal and medical specialist’s stand, see Ágnes Dósa ‘Az orvos kártérítési felelőssége’ [The doctor’s liability for damages] (Budapest: HVG–ORAC 2004) 348 pp.

(3) on the part of both the health supplier and the client, further juri-difying mechanisms (mediations and formalisations) alien to the original ethos and inherent rationality of health care will be subsequently wedged in the previously purely health-centred processes, a condition that may shake its very foundations through a parasitical intrusion. With legal safety becoming a consideration in focus, new practices (eliminating procedures and risky choices once generally accepted in practice) may be introduced. Finally, all this

(4) further professionalises the practices of the medical profession, cutting up traditional treatment processes into artificially isolated partial processes. That is, the medical profession will reduce both frustration and predictable damages by deploying additional (cost-increasing) staff with professional “mind-healing” (psychological) specialisations in the process (as the paradoxical after-effect of the sheer artificiality and exaggerated bureaucratisation that arises from the depersonalisation of the entire procedure while in fact worsening the patient’s prospects to heal)—while needless to say, having no effect.

In the final analysis, all this will not in the slightest degree increase the actual (and morally reasonable) responsibility to be borne by social healthcare for actions that are achievable within the given society’s tolerance and funding limits.

This is probably the most costly outcome both financially and also regarding its erosive effect on the medical ethos, and will result in an external control of health care, alien to it and unduly overcoming it, driven solely by lawyerly arrivism and profiteering as guided by professional imperialism. Yet, at the same time this proves to be the least effective solution. All that notwithstanding, it still seems to step by step subdue the entire medical organisation, whereas this course has by no means been necessary. Two decades ago, at the beginning of our transition from communism, its feasibility and acceptability was still an open issue in Hungary, at a time when external pressure by a professional push—accompanied by an internal agitation to introduce and tolerate an American-type lawyerly rule—first became perceptible in the country.¹⁰

¹⁰ As a member of the Prime Minister’s Advisory Board in the administration of JÓZSEF ANTALL, I initiated repeated informal debates about the issue, while our legal experts from academies and universities, including American advisors and Hungarian scholars of American studies, all kept quiet about the risks. Examining the spirit of those days with the easy wisdom

3. A Clash between Europeanism and Americanism

Considering all this both as a danger and warning¹¹—when research is so exhaustive as to devote attention to cultural anthropological investigations of tribal communities of a few hundred members surviving sporadically¹²—, we might at last take notice of the fact that Atlantic civilisation, so clearly determining our near future, has been composed over the past centuries of two definitely diverging ethoses and social philosophical inspirations, which differ in their very foundations. The contrasts are perhaps most conspicuous today in the difference between the approaches to life as a struggle and to law as a game within it. No doubt, on the one hand, there prevails

- a European CHRISTIAN tradition, characterised by a communal ethos, with the provision of rights as counter-balanced by obligations, in which priority is given to the peace of society, and a traditional culture of virtues is promoted to both circumvent excesses and acknowledge human rights, with a focus on prevention and remedy of actual harms. It is in such an environment that *homo ludens* as a type of playful human who is both dutiful and carefree, i.e., entirely joyful, con-

of hindsight, Catherine Dupré—*Importing the Law in Post-communist Transitions* The Hungarian Constitutional Court and the Right to Human Dignity (Oxford & Portland Oregon: Hart Publishing 2003), p. 57 [Human Rights Law in Perspective]— characterised the image of the West formed by the domestic Left (having turned to libertinism [nihilism? liberalism?] after the fall of Communism) by concluding there was “a glorified and idealised vision of the West and of liberal law” (also referring to the writing of the LUKÁCSian Budapest-school in exile representative, Ferenc Fehér’s ‘Imagining the West’ *Thesis Eleven* [1995], No. 42, pp. 52–68), which “did not correspond much to the reality”.

¹¹ Not by chance, there are intermediary proposals for solution today. Cf., in result of the initiative by László Nagy & Frigyes Kahler ‘Közvetítő (mediátor) felállításának szükségességéről az állampolgárok és a gyógyító intézmények (orvosok) közötti vitás kérdések peren kívüli megoldására’ [On the necessity of involving a mediator for the extra-judicial solution of conflicts between citizens and medical institutions] *Magyar Jog* 42 (1995) 4, pp. 229–231 and Orsolya Heuer ‘Konfliktuskezelés a betegjogi sérelmeknél: Az egészségügyi közvetítő eljárásokról’ [Conflict management in cases of the violation of patients’ rights: on mediatory processes in health care] *Lege Artis Medicinae* 11 (2000) 1, pp. 80–83 {& in <<http://www.la.hu/folyoiratok/lam/0101/11.htm>>}.

¹² See, e.g., as the field work of a tribal legal anthropologist, deceased at an early age, Aster Akalu *The Nuer View of Biological Life Nature and Sexuality in the Experience of the Ethiopian Nuer* (Stockholm: Almqvist & Wiksell International 1989) 64 pp. [Regiæ Societatis Humaniorum Litterarum Lundensis: Scripta Minora 1988–89/1].

stitutes a limiting value.¹³ If, and in so far as, struggle appears on the scene at all, it is mostly recognised as a fight for excellence. As a pathological version, the loneliness of those who avoid participation may lead to disorders of the psyche that require subconscious re-compensation, the symbolic sanctioning of which (typically in the stale and excited Vienna of the turn of 19th and 20th centuries and by a psychologist of middle-class women shut into self-consuming idleness) SIGMUND FREUD accomplished. On the other hand, there has also evolved

• an Americanised individualistic atomisation of society, expecting order out of chaos, with absolutisation of rights ascribed to individuals, all closed back in loneliness. As an outcome, obligations are circumvented by entitlements, and unrestrained struggle becomes a normal course of life with human rights deployed to neutralise and disintegrate community-centred standards. ‘Life is struggle’—the hero of our brave new world enunciates it as a commonplace with teeth clenched, convinced that life is hardly anything but a fight against anybody else (in an improved version, hailed—under the pretext of maximising chances—as civilisatory advancement by re-actualising the ominous *bellum omnium contra omnes*, formulated by THOMAS HOBBS in early modern England). Following such examples, feminist self-reliance may stand for a contemporary pathological ideal type, struggling herself back into unhappy loneliness by engaging in the fight with her jaw and the further abilities she has targeted.

It is mostly such and similar stimuli that nourish our uneasy experience of the globalised present, with ideals of order, standards and cultural patterns that transform status struggles (based on gender, colour, etc.) into struggles in law, and which, under the aegis of law, support disproportionate financial indemnification for alleged psychological injuries so as to gain material fortune, and which thereby replace collective solidarity by individual arrivism and disintegrate cohesive forces by growing societal atomisation.

Is it really such an outcome that we have wanted in our nation building through the centuries? Is it really this that is worth searching for now, when we are freed to shape our fate, given the chance to change the past regime?

¹³ Johan Huizinga *Homo ludens* [Proeve eener bepaling van het spel-element der cultuur (Haarlem: H. D. Tjeenk Willink 1938) xiii + 309 pp.] A Study of the Play-element in Culture, trans. R. F. C. Hull (London: Kegan Paul, Trench, Trubner 1949) x + 220 pp. [International Library of Sociology and Social Reconstruction].

For want of other points of reference in our spiritually emptying world (almost without unconditional respect for, and adherence to, values), let me recall a few lessons taught by historical legal anthropology¹⁴ and the millennial message of legal philosophy,¹⁵ while referring uniformly to the significance of the moment of trust in the mechanisms of feedback and the necessity of complexity in social existence. Well, both in early Jewish, Islamic (etc.) traditions and even nowadays in surviving autochthonous cultures (which lack in resources and, therefore, stipulate maximum efficiency as the condition for survival), we can observe the compulsion through two sorts of axiomatism with clearly ideological operation, which organise human choices into a framework unquestionably ready-made from the outset.¹⁶ One of these perspectival optima is

- the idea of *p r o p o r t i o n a l i t y* with *s e l f - m o d e r a t i o n*, based on the priority of public good. This spread first as *shalom*, or the precedence for public peace to protect societal integrity, which, later in Roman development, was formulated as the dilemma of formalism expressed by the *adage* of *summum ius, summa iniuria*,¹⁷ which was recognised from the Middle Ages on as the virtue of *temperantia*.¹⁸ The other is

¹⁴ Cf., e.g., by the author, 'Anthropological Jurisprudence? Leopold Pospíšil and the Comparative Study of Legal Cultures' in *Law in East and West* On the Occasion of the 30th Anniversary of the Institute of Comparative Law, Waseda University, ed. Institute of Comparative Law, Waseda University (Tokyo: Waseda University Press 1988), pp. 265–285 {& in an abridged form as '«Law», or «More or Less Legal»? *Acta Juridica Hungarica* 34 (1992) 3–4, pp. 139–146}. As a thoroughly theoretical outline, cf. also Joachim Lampe *Grenzen des Rechtspositivismus* Eine rechtsanthropologische Untersuchung (Berlin: Duncker & Humblot 1988) 227 pp. [Schriften zur Rechtslehre 128].

¹⁵ Cf., as a call to natural law, e.g., by the author, 'Legal Philosophy, Legal Theory – and the Future of Theoretical Legal Thought' *Acta Juridica Hungarica* 50 (2009) 3, pp. 237–252 {& in <<http://akademaii.om.hu/content/0318830q86810656/fulltext.pdf>>}.

¹⁶ Cf., e.g., with some of the papers collected in *Összehasonlító jogi kultúrák* ed. Csaba Varga (Budapest: Szent István Társulat 2000) xi + 397 pp. [Jogfilozófiák]—as a revised and partly enlarged version of *Comparative Legal Cultures* ed. Csaba Varga (Aldershot, Hong Kong, Singapore, Sydney: Dartmouth & New York: The New York University Press 1992) xxiv + 614 pp. [The International Library of Essays in Law & Legal Theory, Legal Cultures 1]—, as well as *Jog és antropológia* [Law and anthropology] ed. István H. Szilágyi (Budapest: Szent István Társulat 2000) viii + 366 pp. [Jogfilozófiák].

¹⁷ In a fictional elaboration, see, e.g., Heinrich von Kleist *Michael Kohlhaas* Aus einer alten Chronik [1810] Textausgabe (Hollfeld: C. Bange 1998) 89 pp. [Königs Lektüren 3018] & as ed. John Gearey (New York: Oxford University Press 1967) 180 pp. and, in theoretical treatment, by the author, *Lectures on the Paradigms of Legal Thinking* (Budapest: Akadémiai Kiadó 1999) pp. vii + 279 [Philosophiae Iuris], para. 2.3.1.8.

¹⁸ At CICERO (*Tusculanes* III, 16–18), *sôphrosunê* may be equally realised as *temperantia*, *moderatio* and *modestia*, which he sums up as *frugalitas*. Cf. Jean-Louis Labarrière 'Sagesse et tem-

- the ideal of natural law.

The latter

- presumed human responsibility (in forms developed in East-Asia and Latin America, as well as in Christianity and Islam) for our environment as inherited exclusively for our temporary use, to be handed down to following generations safely *in toto*;
- defined (in its Christianised Greek–Roman version) minimum conditions (suitable to a formulation in sets of principles, rules, and exceptions from rules) as a comprehensive framework for social life in a symbolic expression of the created (or, profanely, the somehow organised) order: first, representing the whole cosmos; then, the humanly observable world; later on, society; and finally, the individual (with responses echoed by both theology and politics, aetiology and cultural anthropology).

Eventually, in our secularised age, this ideal was first replaced by

- endowing the ideal of natural law, unchanged in principle as transcendent to human existence, with changing (developing) contents [*Naturrecht mit wechselndem Inhalte*] at the end of the 19th century,¹⁹ then, by
- its institutionalisation as “the nature of things themselves” [*Natur der Sache; nature des choses*] by the jurisprudence of continental European countries with Latin or German roots after World War II,²⁰ in order to provide guidance for the desirable harmony among functions in conflict, as derivable through pondering upon all circumstances of the issue in question.

pérance’ in *Dictionnaire d’éthique et de philosophie morale* dir. Monique Canto-Sperber (Paris: Presses Universitaires de France 1996), especially at p. 1325.

¹⁹ Rudolf Stammler *Wirtschaft und Recht nach der materialistischen Geschichtsauffassung* Eine sozialphilosophische Untersuchung (Leipzig: Veit 1896) viii + 668 pp. on pp. 184–188.

²⁰ As first outlines, see, above all, Michel Villey ‘La nature des choses’ in his *Seize essais de philosophie du droit* (Paris: Dalloz 1969), pp. 38–59 [Philosophie du Droit 12]; Karl Larenz *Methodenlehre der Rechtswissenschaft* 6. neu bearb. Aufl. (Berlin, etc.: Springer 1991) xviii + 494 [Enzyklopädie der Rechts- und Staatswissenschaft: Abt. Rechtswissenschaft], para. 5.4.b: »Rechtsfortbildung mit Rücksicht auf die »Natur der Sache««, pp. 417. et seq.; and Helmut Coing *Grundzüge der Rechtsphilosophie* 5. Aufl. (Berlin & New York: de Gruyter 1993) xii + 317 pp. [De Gruyter Lehrbuch], para. IV.1; as well as *La nature des choses et le droit* as a separate issue of *Annales de la Faculté de Droit de Toulouse* XII (1964) 1; Hiroshi Noguchi ‘Die Natur der Sache in der juristischen Argumentation’ in *Law in East & West Legal Philosophies in Japan*, ed. Mitsukuni Yasaki (Stuttgart: Steiner 1987), pp. 139–147 [Archiv für Rechts- und Sozialphilosophie, Beiheft 30]; and Stamatios Tzitzis ‘Controverses autour de l’idée de nature des choses et de droit naturel’ *Rechtstheorie* 24 (1993) 14, pp. 469–483.

4. A Search for Reason and Systemicity

Returning to the foundations of the philosophy of science, the first and primary task of human thinking is to delineate the frameworks, boundaries and limits within which human action may have a context, which prompted our ancestors to search for methodological ways of thought. In fact, from the age of RENÉ DESCARTES, European civilisation reduced that which may be thought of at all to that which can be deduced from some unquestionable truths through logical (re)construction. This has led to a kind of naturalism, reminiscent of naive realism patterned on the wisdom of *lex mentis est lex entis*,²¹ presuming parallelism, as well as correspondence, between thought and reality. Conversely, in early times, even the created nature of the world was conceived of in a geometrical order according to a mathematical ideal, inspired by the Biblical exposition “[b]ut you have disposed all things by measure and number and weight”.²² As a result, human thought was also confined to a *mathesis universalis*, posited as mere conceptual arithmetic within the presumption of an all-pervasive natural systemicity that could be notionalised. Through the Enlightenment’s combatant materialism, modelling cognition upon the pattern of reflection was developed in depth, which survived, among other things, as the central epistemo-ontological pre-supposition of MARXism, summarised and simplified as the notorious LENINist theory of reflection. Most of the unconditional hegemony of rationalism survived from all of this until today.²³ This is the dogma according to which only that which is rationally justifiable can become the subject of theoretical reconstruction—ignoring the brutal fact that, as a side-effect of modern scientific revolution, such a mind-set can only contribute to depriving man of his further qualities; for man, with his inborn *facultases*, is significantly richer in emotional, intuitive, transcendent (etc.)

²¹ Ferenc Patsch ‘Dogmatikai kijelentések hermeneutikai fejlődése (Egy »fundamentál-hermeneutikai dogmatika« vázlata)’ [Hermeneutical development of dogmatic statements: outlines of a »fundamental-hermeneutical dogmatics«] in *Egység a különbözőségben* A 60 éves Bolberitz Pál köszöntése [Unity in diversity: Essays in honour of Pál Bolberitz on the occasion of his 60th birthday] ed. Zoltán Rokay (Budapest: Szent István Társulat 2002), pp. 117 et seq., especially para. 1.

²² The Book of Wisdom 11:20 in *The New American Bible* in <http://www.vatican.va/archieve/ENG0839/_PLS.HTM>.

²³ As a distorted outcome in law, cf., by the author, ‘Joguralom? Jogmánia? Ésszerűség és anarchia határmezsgyéjén Amerikában’ [Rule of law? Mania of law? On rationality verging on anarchy in America] *Válóság* XLV (2002) 9, pp. 1–10 {in review of Paul F. Campos *jurismania* The Madness of American Law (New York & Oxford: Oxford University Press 1998) xi + 198 pp.}.

life than is claimed by the idea that reduces his complexity (when assessing his self-positioning in the world) to one single, exclusive quality, that of alleged (and apparent) rationality.²⁴

This is the pattern with which the very concept of ‘social science’ complies: in its origins, it is a typically American leftist idea (originating from the same source as MARXism, namely, scientific positivism), according to which science regarding society can be built on thoroughly factual foundations with empirical methodology, enabling social engineers to draw necessary conclusions by measuring given attitudes (etc.) to predict future behaviour (etc.). Well, using “sterile morphology” (which flourished from the interwar period up to the 1950s, as marked by TALCOTT PARSONS’ a-historically universalised analytical system of concepts) has today proved to be a dead end,²⁵ re-admitting the old ideal of the Humanities, while admitting that when we approach the specifically human, something more is at stake than rational codifiability alone.

Obviously, even more is at stake when we encounter the claim (rejuvenated after the failure of the one-time attempt to axiomatise ethics)²⁶ that we should negotiate moral and social psychological issues on the pattern of classical analysis taken as conceptual mathematics, absolutising a methodology according to which—of course, for the sake and within the bounds of the given conceptual system—only that which can be rationally concluded and justified is thinkable at all, while forgetting that human reflection is by far more complex than that.²⁷

Therefore, as against a mechanical world-concept symbolised by the ancient clockwork’s metaphor,²⁸ our existence is nonetheless a total whole throughout: a totality resulting from the constant competition of interac-

²⁴ In overview, cf., by the author, ‘Önmagát felemelő ember? Korunk racionalizmusának dilemmái’ [Man elevating himself? Dilemmas of rationalism in our age] in *Sodródó emberiség* Tanulmányok Várkonyi Nándor »Az ötödik ember« című művéről [Mankind adrift: on the work of Nándor Várkonyi’s »The Fifth Man«] ed. Katalin Mezey (Budapest: Széphalom 2000), pp. 61–93.

²⁵ Daniel Bell in *The Fontana Dictionary of Modern Thinkers* ed. Alan Bullock & R. B. Woodings (London: Fontana Paperbacks 1983), p. 580. Cf. also Stanislaw Andreski *Social Sciences as Sorcery* (London: Deutsch 1972) 238 pp.

²⁶ George Edward Moore *Principia Ethica* (Cambridge: University Press 1903) xxvii + 232 pp.

²⁷ Such a methodology can indeed be approved of in fields depending upon positivation, that is, aimed at some strictly delimited and exclusively theoretical modelling that selects from the whole arbitrarily, but according to human purposes. If over-extended or extrapolated, then it also becomes problematic on its own terms.

²⁸ Cf., by the author, *Lectures...* [note 17], pp. 84–85, note 109.

tions by practically unlimited sets of uninterrupted processes, (re)generated in *autopoiesis*, which inseparably closes its ontological and epistemological determinations and partial processes back into its total process. If we do not raise the issue as a theologically founded query (or if we reject, in the spirit of OCCAM's razor, the teleological moment that could be raised from the outset), then it remains an insoluble enigma whether or not that which we think of as a limit in terms of values in such processes can at the same time also be regarded as objective. Or, formulated as a paradox, is 'objectivity' available at all when one insists on "pure" scholarship?²⁹

5. Ethics in Economy

Returning again to economy, we have to conclude that without a vision of man in his entire complexity (including the theological, anthropological, ethical and psychological aspects as well), not even *economy* can be fully explained. Obviously, ethics is also necessary for economy as a *desideratum* in order to construct mentally and posit ontologically it. In other words, economic rationality is certainly at its proper place in precalculation when we consider probabilities or take it into account as one of the criteria in managing conflicting situations, but it certainly cannot be the exclusive motivation to rely on in the operation of the overall complex. Or, ethics is by far not just a corrective, complementary factor in economy. This is of a foundational significance, giving it a framework so that the issue of economic rationality itself can be raised at all.

As we have already remarked, in legal regulation the concept of a system (formulated by, e.g., HUGO GROTIUS at the dawn of the modern age), built up exhaustively and seamlessly in (natural) law and formed according to the ideal of *mos geometricus* as broken down into individual positivations according to logical necessity, was later replaced by the mere definition of basic principles and (somewhat as an added exemplification) their arrangement in rules and exceptions from rules, so that the various situations in life

²⁹ See *Proceedings of the Symposium on Scientific Objectivity* [held at »Rolighed«, Vedbæk, May 14–16, 1976] ed. Göran Hermerén (Copenhagen: Munksgaard 1978) in *Danish Yearbook of Philosophy* 14 (1977), pp. 1–216.

can be judged according to principles in a patterned but individualised way, bearing their total complexity in mind. Likewise in economy, morality serves as an ethos defining a general direction, while in individual situations it helps in balancing conflicts of values by mediating amongst diverging interests mutually considered, leading finally to compromise solutions. Consequently in economy

- at the level of *m a c r o - p r o c e s s e s*, morality is an ontic component to serve as a foundation that makes economic rationality reasonable and also socially interpretable; while
- in *m i c r o - p r o c e s s e s*, it has also to be taken cognisance of in the background, aware of the fact that it almost never makes recourse directly and one-sidedly but through reconciliatory processes, in order to solve conflicts and reach compromises by balancing, mediating, and mutual consideration.

It is exactly such a duality that opens up to both further requirements and additional wide-ranging prospects that may prove to be useful in our procedures at any time, for

- in *m a c r o - r e l a t i o n s* (e.g., in patterns proposed by medical law), it is exactly ethical considerations that generate the alternative models that we can endow, through strategic planning and a series of tactical decisions, with a definite patterning function, standardised as comprehensive social policies, after their harmonisation with prevailing economic and legal policies is accomplished; while
- in *m i c r o - r e l a t i o n s*, we have to provide for its exemplary operations through education, socialisation, and case analysis, caring for the diverse particularity of individual situations with proper empathy, after our ultimate goals are also taken into account.

With this, we have opted for the demand for human entirety, encouraged to avail ourselves of the potentialities offered by specialisation and homogenisation in our complex age with good conscience, but at all times in such a

way as not to miss the ultimate goal, the intention—desirably a guide for all our human actions—of effectively implementing fundamental values in practice.³⁰

³⁰ Originally, the present developments were drafted as the moderator's concluding words at a workshop organised by OCIFE Hungary at the Faculty of Law of Pázmány Péter Catholic University nearly half a decade ago. The basic dilemma has kept me continuously occupied ever since, especially as it is applied to legal problems, both in theory and practice. For my earlier attempts at outlining a theoretical framework, see, by the author, 'Doctrine and Technique in Law' *Iustum Aequum Salutare* IV (2008) 1, pp. 23–37 {& <<http://www.jak.ppke.hu/hir/ias20081sz/02.pdf>> and <www.univie.ac.at/RI/IRIS2004/ArbeitspapierIn/Publikationsfreigabe/Csaba_Phil/Csaba_Phil.doc>} as well as 'Buts et moyens en droit' in *Giovanni Paolo II Le vie della giustizia: Itinerari per il terzo millennio* (Omaggio dei giuristi a Sua Santità nel XXV anno di pontificato) a cura di Aldo Loiodice & Massimo Vari (Roma: Bardi Editore & Libreria Editrice Vaticana 2003), pp. 71–75 {& as enlarged, 'Goals and Means in Law: or Janus-faced Abstract Rights [Tikslai ir priemonės teisėje]' in *Jurisprudencija* [Vilnius: Mykolas Romeris Universitas] (2005) 68(60), pp. 5–10 and <<http://www.mruni.lt/padaliniai/leidyba/jurisprudencija/juris60.pdf>> <<http://www.thomasinternational.org/projects/step/confeences/20050712budapest/varga1.htm>>}. .

TOWARDS AN AUTONOMOUS LEGAL POLICY*

1. Relationship between Politics and Law [216] 2. Legal Policy as a Mediator [218] 3. Legal Scholarship, Legal Policy, and the Law on Law [219] 4. Demand for an Autonomous Legal Policy [221]

The pursuit of legal policy and the need to lay its scientific foundations are generated both by political maturity and society's respect for what is distinctive in law. Numerous programmes—official and unofficial (initiated mostly in scholarly circles) alike—were also launched in Hungary to draw the outlines of legal policy and set its requirements. Nevertheless, there are basic notions that such programmes frequently and recurrently regard as initially given, thereby leaving some essential relations unclear. The present paper attempts to clarify the interrelations of some of such notions.

1. Relationship between Politics and Law

Both politics and law are situated within the social totality, hence they mutually refer to and precondition one another. However, their roles played in social existence are of different weight. *Politics*, on the one hand, is a complex that reconciles the fundamental interests of society, transforming them into dominant interests and, thereby, contributing to the integration of society. *Law*, on the other, is a kind of complex that, by and large, mediates between other complexes of society. For this reason, law is dependent on, in its relationships to, other fundamental complexes: its value lies in mediation, that is, in the mediated complexes outside its own sphere (thus, primarily, in the transformation and shaping of politics, economy, culture, and so

* In its first version in Hungarian, the paper was prepared for the workshop organised by the Eötvös Loránd University Faculty of Law for the Ministry of Justice at Pilisszentkereszt in 1984. As published within the latter's proceedings, cf. 'Für die Selbstständigkeit der Rechtspolitik' in *Die rechtstheoretischen Probleme von der wissenschaftlichen Grundlegung der Rechtspolitik* hrsg. Mihály Samu (Budapest: Igazságügyi Minisztérium Tudományos és Tájékoztatási Főosztály 1986), pp. 283–294 [Tudományos füzetek]. Also presented in English and abstracted in [23rd World IVR Congress of Philosophy of Law and Social Philosophy] *Law and Legal Cultures in the 21st Century: Diversity and Unity* Working Groups Abstracts (Kraków: Jagiellonian University Press 2007), p. 111 & <http://www.law.uj.edu.pl/ivr2007/Abstracts_WG.pdf>.

on, through its own medium). This means that politics usually outweighs law in social processes (as we may perceive the economic sphere to outweigh the political one—in the long run and in a historical perspective). This, however, by no means alters the fact of their mutual dependence (naturally, from the point forward at which social classes, divided into antagonistic oppositions, and their integration by means of the state, etc., are born).

Within this relationship, the connections between politics and law can be either direct or indirect. The way in which connections evolve is largely a function of *s o c i a l i s a t i o n*. By socialisation, we mean the advancing process of breaking with natural existence, with social relations becoming increasingly complex, and the purely social functions of mediation and the state of everything being increasingly mediated coming to prominence and then to full perfection. Such processes can take place either on an *o n t o - g e n e t i c* or on a *p h y l o g e n e t i c* plane. The overall development of humanity from primitive ages to developed civilisations makes up the ontogenetic plane, whereas the development of a society organised into a state from its anarchistic or revolutionary origins up to its consolidation represents the phylogenetic one.

Between politics and law, *d i r e c t c o n n e c t i o n s* were characteristic of early, primitive forms. These could already be observed in archaic times, that is, beginning with the ancient forms of development—especially in autocratic societies relying on despotism or unconditional absolutism. They can be noticed also in anarchistic or revolutionary processes of transformation, as well as in areas of political destabilisation resulting in anarchy or revolution. The examples range from original state-organisations (e.g., the North-American strong-arm law), via periods of revolutionary transition (e.g., what *LENIN* consciously undertook after the October Revolution), to destabilising intervals of political struggle (e.g., the events that took place under the banner of “cultural revolution” in China). The common feature of these states is that the political power at any given time, on the one hand, shapes the law directly, whilst the law, on the other, is not in a position to shape or organise the power: the latter can provide additional forms to the conditions of the former, for instance, at most through its legitimisation. In such instances, the law can directly take over the functions of the power (thereby becoming degraded or instrumentalised into a mere glamour, rite or propaganda in the hands of the power), while, in its turn, the power can directly fulfil roles specific to the law (most often in the form of a lawless jurisdiction, be it based on brute force, “revolutionary consciousness”, or on the leader *MAO*’s citation).

I n d i r e c t c o n n e c t i o n s presume formation of distinctive traits and acquisition of relative independence on the part of both politics and law. In such a phase, politics is filtered through law, being “tamed” by the law—organised and mediated by it in relevant aspects. At the same time, politics can influence law only through the law’s own medium; thus, it can prevail only as filtered through the particularities of law. Since socialisation and the acts of mediation approach a state of increasingly pure social indirectness, the relationship of politics and law becomes complex in that not only moral and religious, but also political and party norms contribute to a balance in which the political influence exerted on the evolution and assertion of law will stay within certain limits without transcending them. Both law and politics more and more require such a complexity as backed by their own departmental interests—that is, in order to grow in their respective legitimacies and also in their effectiveness in socio-political organisation.

2. Legal Policy as a Mediator

In the increasingly socialising practice of regularly guaranteed mutual influence, an intermediate area is becoming formed, which can be gradually distinguished from both sides as it eventually gains relative independence in that the specifically political can impact upon that which is to be channelled by exerting influence on the specifically legal. This is the field of **l e g a l p o l i c y**.

From the point of view of its purport, means and mechanism of functioning, legal policy is **p o l i t i c s** insofar as it is aimed at political pressure through recourse to non formal(ised) means. At the same time, it is **l a w** from the point of view of the targeted medium of exerting an influence, taken as a provoking and stimulating filter, which lets through (by selecting) given kinds of influence, with its particular structure transforming the exertion of influence. For it is nothing but the legal that is directly targeted, by preserving its optimum legal quality, when the non-legal is re-formulated in law by homogenising it according to and within the legal medium. Therefore, legal policy affords a specific intermediary in the transition of politics to law and vice versa, concomitantly bearing the distinctive features of both.

Accordingly, legal policy is (1) a medium of **i n f l u e n c e** by politics on law. However, it is not a medium of (2) any kind of influence whatsoever,

but only of those made c o n s c i o u s in their abstract generality and formulated, objectified, recorded and processed as such. For this reason,

- characteristic manifestations of legal policy are those in which political and legal demands are condensed into an abstract generality;
- this generality provides a filtering role that enables politics to exert an influence on law with the effect of becoming radiated within the law; while
- regardless of this, the effect of the concrete on the concrete (of the particular on the particular) may still be created directly—or significantly more directly than otherwise.

3. Legal Scholarship, Legal Policy, and the Law on Law

From what we have said above we can derive the fact that, in the final account, legal policy is a kind of politics broken down as applied to a particular terrain, sector or profession. At the same time, it is not a simple passive filter but the reformulation of g e n e r a l p o l i c y i n t e r m s a n d u n d e r t h e c o n d i t i o n s o f s p e c i f i c p a r t i c u l a r i t i e s . Accordingly, through its specific filter it can lead to either

- letting political effects through, or
- blocking political effects, or
- creating something new in its homogeneous instrumental medium that did not and could not have been born directly and spontaneously from within the uninstrumentalised heterogeneous social reality.

From this it also follows that legal policy is p r a c t i c a l a category with the ultimate criterion of e f f e c t i v e n e s s . In consequence, the effects of such theoretical qualities as a selection based upon true cognition and proper evaluation can only surface in the long run within the framework of and as subordinated to effectiveness.

Within such a view, legal scholarship, legal policy and the law on law can be clearly separated conceptually from one another.

The task of s c h o l a r s h i p is to disclose through analysis the developmental regularities and correlations between the relevant phenomena as components of reality. Instead of performing evaluation *per se*, it presents feasible historical alternatives with all of their consequences. It does not process values and evaluations, goals and goal-settings, forms of consciousness and ideologies in terms of their own evaluation, goal-setting and/or ideology but as historically objectively emerging components of social existence.

Legal policy performs its own evaluation, goal-setting and/or ideologisation as a result of scholarly analysis but within the sphere of politics. Its fundamental task is to help achieve the practical realisation of what is feasible and available in principle, or at least to transform the idea of realisation into a task now seen as practical.

The law on law reformulates, according to the formalities of positive law and reinforced by its compulsory force, that which legal policy has formulated, which is generally regulated by normative means, and thus withstands specific regulation on the level of the particular for one or another reason.

In the field of law-making, this triple task is designated by the science of law-making [*Gesetzgebungslehre*] as an area of jurisprudence dedicated to clarification of the philosophical, theoretical and sociological foundations of legislation and its correlations; to law-making policy as a field of legal policy concerned with the selection of values that are considered desirable *hic et nunc* as drawn from the results of *Gesetzgebungslehre*; and, finally, to the statute on law-making as an area of positive enactment of what, through which procedures and ways and with what formal requirements, is to be regulated. In principle, in the field of law-application we can similarly distinguish the science of law-application, law-applying policy and the statute on law-application.

At the same time, it certainly marks the pathology of social development and the destruction of the law's own distinctiveness with its eventual annihilation if the law is not held sufficient in, by and of itself; therefore, it is construed that something of a "legal policy" is also required to marshal the law towards social goals, to supplement the law by surpassing or even denying it in practical effects. (The example of Hungary after World War II can be recalled when, as part of the struggle for power, the Administrative Court was banned by the Communists because it insisted on strictly relying upon the law and considerations drawn from the law. To balance this, a separate "legal policy supervision" was instituted in practice both structurally and ideologically, so that after 1949 the daily tactics of politics could also prevail in law and force everything particularly legal into the background.) It also proves an unhealthy course of development if legal policy considerations are granted a role as a general subsidiary within the sources of the law to fill gaps. Finally, it is obviously a sign of social disorder if legal policy is taken as a completed regulation with the effect that actual regulations are no longer enforced.

4. Demand for an Autonomous Legal Policy

Socio-ontological considerations already suggest that socialisation not only means that social structures become more complex and their functioning presumes a more complex mediation, but also that it is a process in which both the particularity of the components, active in its functioning, and the relative autonomy of such particularities in the mechanism of mediation are allowed to evolve and gain ground, increasingly influencing the entire social motion. In as much as this holds true, our conclusion is almost self-evident: the given stage of socialisation presumes a given degree of political autonomy, and this autonomy presumes the formation and separation of legal policy as a mediator between politics and law.

Thus, it is an indispensable precondition to the healthy functioning of both politics and law that a specific medium—*l e g a l p o l i c y*—be inserted into the overall socio-political process as a selective and formative filter of political influence exerted upon law and vice versa. However, once this is established, everything we have said in relation to mediators as a requirement and consequence of socialisation will be true for mediators between mediators as well. That is, legal policy can carry out its role adequately only by bringing its particularities to perfection, and acquiring a relative independence and autonomy from both politics and law.

ON PROCESSES OF LAW

THE JUDICIAL BLACK-BOX AND THE RULE OF LAW in the Context of European Unification and Globalisation*

I. BASIC ISSUES IN THE UNDERSTANDING OF LAW [225] 1. Normativism and Legal Reality (Re)Construction [225] 2. The Insufficiency of the Law Enacted [227] 3. Duplicity of the Ontological Reconstruction of Judicial Process [227] 4. The Law as Rule and the Law as Culture [231] 5. Complementation by the Law's Self-resolution in Post Modernism [232] 6. The Metaphoric Nature of the Term 'Law' [234] 7. Added Queries for the European and International Rule of Law [235] II. QUESTIONS TO BE RAISED BY LEGAL ARRANGEMENTS INDIVIDUALLY [236] 8. Law as Subsistence and Law as Conventionalisation [236] 9. Dilemmas of the Law Exhaustively Embodied by Texts, Thoroughly Conceptualised and Logified [237] 10. *Conservatio/novatio, ius strictum / ius aequum, generalisatio/exceptio*, and the Moment of Decision [238] III. THE CIRCLE OF LEGAL ARRANGEMENTS TO BE INVOLVED IN THE INVESTIGATION [240] 11. Cultures and Traditions to be Investigated [241] IV. Purpose and Impact of Investigations [241] 12. The Tasks' Horizons [241]

I. BASIC ISSUES IN THE UNDERSTANDING OF LAW

1. Normativism and Legal Reality (Re)Construction

For purposes of an ontological reconstruction, the significance of *juristische Weltanschauung* as one of the original components of law's very existence (in addition to objectified embodiments) is definitely shown by the fact that institutionalised social existence, whatever it be, cannot but withstand those kinds of simplification inspired by the NEWTONian outlook of the universe (reducing reality to occasional intertwinement of causal series originated by things and powers directed at them), in terms of which we may and must differentiate the 'construction' itself (as given from the outset) from its 'being made to function' as a complementation exteriorly and subsequently added to the former by an individual purposeful or random act; albeit, when we are consider-

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ing social dynamics with social institutions at work, we are tempted to simplify the analysis by taking the two above components as some bifactoral mechanism that has been organised into a single functional system. As opposed to the physical world, however, in the specifically social world the kinds of phenomena (features and aspects) suitable to be reconstrued from their actual movement as their genuine subsistence can exclusively be thought of as prevailing through having the specific quality of ‘social existence’.¹

Consequently, the ontological status of the way in which the jurist approaches law in a manner sanctioned by the approved canons of the profession—describing the kinds of intellectual operations he or she usually performs by referencing the law and the actual ways in which real life situations are judged by justices in law (as if all of it were a simple deduction from the law valid at the time)—is hardly more or less than what is called *professional deontology*. And this is not simply a case of false ideology (as usually treated by MARXism) but a specific procedure of (virtual? real? in any case, actual) reality construction, controlled by the required mental referencing as a mediator wedged in-between,² as if the same background idea asserted in the professional conceptualisation of norms would also be repeated here as applied to the overall functioning of the normative world. For, in the same way as the norm is neither descriptive—therefore necessarily true/false—nor it is a ‘reflection’ (the fact notwithstanding that its lingual expression suggests it was exactly some description of ontological relations),³ this reality construction is not effectuated—„caused”, or made to have no alternatives at all in practical decision making—by the norm (the fact notwithstanding that the normative understanding of norms pictures and officially justifies it as such).⁴

¹ Cf. Csaba Varga *Lectures on the Paradigms of Legal Thinking* [1996] (Budapest: Akadémiai Kiadó 1999) vii + 279 pp. [Philosophiae Iuris].

² Cf. Csaba Varga *The Place of Law in Lukács’ World Concept* [1981] (Budapest: Akadémiai Kiadó 1985; ²1998) 193 pp. ‘Mediation’ [*Vermittlung*] is a key term of George Lukács’ posthumous *Zur Ontologie des gesellschaftlichen Seins*.

For a background, see *Marxian Legal Theory* ed. Csaba Varga (Aldershot, Hong Kong, Singapore, Sydney: Dartmouth & New York: The New York University Press 1993) xxvii + 530 pp. [The International Library of Essays in Law & Legal Theory, Schools 9].

³ Cf. Csaba Varga ‘A magatartási szabály és az objektív igazság kérdése’ [Rule of behaviour & the issue of objective truth, 1964] in his *Útkeresés Kísérletek – kéziratban* [Searching for a path: Unpublished essays] (Budapest: Szent István Társulat 2001), pp. 4–18 [Jogfilozófiák].

⁴ Cf., in summation of a decade’s research previously published in huge a many parts, Csaba Varga *Theory of the Judicial Process The Establishment of Facts* [1992] (Budapest: Akadémiai Kiadó 1995) vii + 249 pp. Later on, a similar conclusion was reached from the phenome-

2. The Insufficiency of the Law Enacted

The duality of ‘law in books’ and ‘law in action’ (which ROSCOE POUND formulated originally as a pioneering category of legal sociology after he had realised that positivation itself cannot automatically be equated to textual effects referenced in implementation) was turned into a genuine paradox when it was also revealed that differing normative orders, heterogeneous to one another to such an extent as to be almost incommensurable when their textures are compared, can, nevertheless, exert quite a commensurable impact as measured by the social effect they may create in societies at by and large comparable levels of civilisation.⁵

Accordingly, one may raise the issue whether or not there may be a hidden (and hitherto unrecognised) “magic” (perhaps exerting influence on/through other—cultural?—paths) similarity (or some mechanism of effects resulting in comparable ends) among such linguistically differently expressed and culturally differently contextualised rules aiming at behavioural regulation and control, or whether the norm(s) posited by them can only qualify as a decisive factor in decision-making by their mere appearance and underlying normative ideology, while in fact other (further) circumstances do play the role of determination in (parts or the over-weighty part of) the actual process.⁶

3. Duplicity of the Ontological Reconstruction of Judicial Process

The answer is to be searched for in the actual functioning of the ‘judicial mind’ taken as a ‘black-box’ (symbol of a self-regulating cybernetic entity), in the case of which, its internal laws remaining unknown, we can

nologisation of Critical Legal Studies by William A. Conklin *The Phenomenology of Modern Legal Discourse* The Judicial Production and the Disclosure of Suffering (Aldershot, etc.: Ashgate 1998) xii + 285 pp., preceded, as a case study, by his ‘Human Rights, Language and Law: A Survey of Semiotics and Phenomenology’ *Ottawa Law Review* 27 (1995–1996) 1, pp. 129–173.

⁵ Konrad Zweigert ‘Solutions identiques par des voies différentes (Quelques observations en matières de droit comparé)’ *Revue internationale de Droit comparé* XVIII (1966) 1, pp. 5–18.

⁶ Cf. Csaba Varga ‘Theory and Practice in Law: On the Magical Role of Legal Technique’ *Acta Juridica Hungarica* 47 (2006) 4, pp. 351–372 {& <<http://www.akademiai.com/content/j4k2u58xk7rj6541/fulltext.pdf>>.

only try to reconstruct the regularities at work in it through analysis of its actual data processing, by comparing its in-puts to its respective out-puts.⁷

First of all, the judicial mind aims at resolving (by settling) the conflicts of prevailing interests (involving the axiological conflicts behind them) brought before court fora, by asserting whichever alternative of resolution

⁷ Cf. <[http://en.wikipedia.org/wiki/Black_box_\(systems\)>](http://en.wikipedia.org/wiki/Black_box_(systems)>) }.

For Chris Lucas *Cybernetics and Stochastic Systems* in <<http://www.calresco.org/lucas/systems.htm>>, “Cybernetics is the science [...] of the black box, in which the how is irrelevant and only the what matters”. For [Syggraph2006] *Cybernetic Ceremony in Black Velvet* in <<http://www.sherban-epure.com/sesite2008few/calledpgs/sigg06slideprsnntn.pdf>>, p. 11, “A black box produces an output, when exposed to an input.” For Ranulph Glanville ‘The Black Box, Design and Second Order Cybernetics’ in <http://209.85.129.132/search?q=cache:CwaqAvc33UUJ:ead.verhaag.net/speaker_info.php%3Fid3D507+black+box+cybernetics&hl=hu&ct=clnk&cd=87&gl=hu>, “Cybernetics has often used the black box as a device that allows explanations to be built of things that cannot be directly observed.”

Going into more details, *A Time Travel to the Early Theory of Evolution Strategies* in <<http://ls11-www.cs.uni-dortmund.de/people/rudolph/publications/papers/HPS-Rudolph.pdf>> opinions on p. 1 that “Since the interrelationships between the variable input parameters and the dependent output behavior are unknown, we encounter a black box situation in the cybernetic sense: In case of a closed system with high complexity the only thing you can do is the measuring of the input/output relations.” Holk Cruse *Neural Networks as Cybernetic System* 2nd rev. ed. in <<http://209.85.129.132/search?q=cacheK-zEvbCSwycJ:www.brains-minds-media.org/rchive/289+black+box+cybernetics&hl=hu&ct=clnk&cd=75&gl=hu>> explicates that “If one was able to look inside the black box, the system might consist of a number of subsystems which are connected in different ways. One aim of this approach is to enable conclusions to be reached concerning the internal structure of the system.” (para. 1.1), for (as continued in para. 1.3), “Taking this input-output relation as a starting point, attempts are made to draw conclusions as to how the system is constructed, i. e., what elements it consists of and how these are connected.” Finally for us, George Kampis *Explicit Epistemology* in <<http://hps.elte.hu/~gk/Publications/JapanEE.html>> has the stand on p. 1, according to which “A »black box« is any system that we examine exclusively by what it reveals about itself in terms of relations to some external states of affairs, called the inputs and the outputs. The usual point in the black box story is that under very mild conditions the »blackness« of the box (that is, that we don’t know what’s inside) can be undone, and the internal structure of the box can be discovered, thereby yielding, well, a »white box« which is transparent for us.”

For its methodological use in jurisprudence, cf., by Csaba Varga, ‘Les bases sociales du raisonnement juridique’ *Logique et Analyse* [Leuven] (1971), Nos. 53–54, pp. 171–176 & in *Le raisonnement juridique* (Actes du Congrès mondial de Philosophie du Droit et de Philosophie sociale) publ. Hubert Hubien (Bruxelles: Établissements Émile Bruylant 1971), pp. 171–176, and further developed in ‘On the Socially Determined Nature of Legal Reasoning’ *Logique et Analyse* [Leuven] (1973), Nos. 61–62, pp. 21–78 & in *Études de logique juridique* V, publ. Ch[aim] Perelman (Bruxelles: Établissements Émile Bruylant 1973), pp. 21–78 [Travaux de Centre National de Recherches de Logique]. Cf. also Dan Simon ‘A Third View of the Black

(settlement) it considers the most defensible from amongst (while balancing amongst) all the feasible (or presented) variations—by fulfilling, inasmuch as is available at an optimum level, the ‘system of fulfilment’ [*Erfüllungssystem*] canonised in the given legal regime—, all this being operated by the law’s particular technicality that, in each and every case in principle, makes it possible with equal logical chance (that is, in a way no longer limitable or controllable by logic) to select those procedures from the stock of available (incidentally, including even logically mutually contradictory) techniques,⁸ with the help of which one may argue for the given norm covering or not covering (and, therefore, for the norm to be applied or not applied to) the case at

Box: Cognitive Coherence in Judicial Decision Making’ *The University of Chicago Law Review* 71 (2004) 2, pp. 511–584.

The demand for a systematic inquiry into the judicial mind—e.g., Wolfgang Fikentscher *Modes of Thought A Study in the Anthropology of Law and Religion* [1995] 2. überarb. Auflage (Tübingen: Mohr Siebeck 2004) lxxxi + 633 pp.—has been built on such and similar preassumption. Cf. also, by Csaba Varga, ‘Structures in Legal Systems: Artificiality, Relativity, and Interdependency of Structuring Elements in a Practical (Hermeneutical) Context’ *Acta Juridica Hungarica* 43 (2002) 3–4, pp. 219–232 {& in <<http://www.akademiai.com/content/r27863g6u01q777u/fulltext.pdf>> and in *La structure des systèmes juridiques* [Collection des rapports, XVI^e Congrès de l’Académie internationale de droit comparé, Brisbane 2002] dir. Olivier Moréteau & Jacques Vanderlinden (Bruxelles: Bruylant 2003), pp. 291–300}, ‘Legal Logic and the Internal Contradiction of Law’ in *Informationstechnik in der juristischen Realität Aktuelle Fragen zur Rechtsinformatik* 2004, hrsg. Erich Schweighofer, Doris Liebwald, Günther Kreuzbauer & Thomas Menzel (Wien: Verlag Österreich 2004), pp. 49–56 [Schriftenreihe Rechtsinformatik 9], ‘Change of Paradigms in Legal Reconstruction (Carl Schmitt and the Temptation to Finally Reach a Synthesis)’ in *Perspectives on Jurisprudence Essays in Honor of Jes Bjarup*, ed. Peter Wahlgren (Stockholm: Stockholm Institute for Scandinavian Law 2005) [= *Scandinavian Studies in Law* 48], pp. 517–529 {& *Rivista internazionale di Filosofia del Diritto* [Roma] LXXXI (ottobre / dicembre 2004) 4, pp. 691–707}, ‘Legal Traditions? In Search for Families and Cultures of Law’ in *Legal Theory / Teoría del derecho Legal Positivism and Conceptual Analysis / Positvismo jurídico y análisis conceptual: Proceedings of the 22nd IVR World Congress Granada 2005, I*, ed. José Juan Moreso (Stuttgart: Steiner 2007), pp. 181–193 [ARSP Beiheft 106] {& [as a national report presented at the World Congress of the International Academy of Comparative Law] in <<http://www2.law.uu.nl/priv/AIDC/PDF%20files/IA/IA%20-%20Hungary.pdf>> & *Acta Juridica Hungarica* 46 (2005) 3–4, pp. 177–197 & <<http://www.akadeiai.com/content/f4q175h0174r11/fulltext.pdf>>}, as well as ‘Doctrine and Technique in Law’ *Iustum Aequum Salutare* IV (2008) 1, pp. 23–37 {& <<http://www.jak.ppke.hu/hir/ias/20081sz/02.pdf>> & <www.univie.ac.at/RI/IRIS2004/Arbeitspapierlern/Publikationsfreigabe/Csaba_Phil/Csaba_Phildoc>}.

⁸ For the foundational outlines, cf. Csaba Varga & József Szájer ‘Legal Technique’ in *Rechtskultur – Denkkultur Ergebnisse des ungarisch-österreichischen Symposiums der Internationalen Vereinigung für Rechts- und Sozialphilosophie* 1987, hrsg. Erhard Mock & Csaba Varga (Stuttgart: Franz Steiner Verlag Wiesbaden 1989), pp. 136–147 [Archiv für Rechts- und Sozialphilosophie, Beiheft 35].

hand, and respectively, by the help of which—in the name of our common respect for the law—either strict or equitable judicial adjudication can be employed almost at pleasure, when the strictness of the wording of the law is also loosened in cases when a programme “to make the law living and liveable” has been appealed for.

Accordingly, behind the stage appearance and ideology of mere norm application there is always a human being standing at work, with an individual valuation and, further, full human(e)ly personal *facultates* mobilised when the determination is taken to (and how to) decide. For the hermeneutic definition of the very understanding of norms as a kind of cultural predisposition [*Vorverständnis*] will from the beginning have a selective effect on the judicial ascertainment of both those facts that shall constitute the given case (*Tatbestand*, taken as the legally exclusively relevant set of facts to be judged) and the norm to be applied to them (including its actual meaning reflected in, by being validated in, the given case). On the one hand and always subsequently, the logic of justification cannot but infer the decision from the given normative set by positing that there is an available cluster of norms from which the case-specific and case-conforming selection has been made and, in its turn, the selected norm will have already defined what fact(s) can be taken as relevant for the actual norm application. On the other hand, however, from the point of view of the logic of problem-solving (that is, the genuine logic at work in the actual process), any consideration of either facts or norms can be marshalled at all in simultaneous mutuality of both sides as complementarily reflected upon and through (as tested by) one another.

This is why in an ontological reconstruction of the judicial process, the judicial operation with both legal provisions and so-called facts can only be termed manipulation. On its behalf and as the temporary end product of judicial reality construction, this manipulation will produce so-called case-law, on the one hand, and law-case, on the other. The former represents law as actualised to a concrete life situation, while the latter stands for the legal reconstruction of real life facts that will then be adjudicated in law. It is to be seen that the exclusive reason and genuine roots of both sides lies in their having been mutually reflected—the fact notwithstanding that the official court opinion is to build on the hypothesis (taken as an ideological claim) of their being independently posited and then related to one another.

4. The Law as Rule and the Law as Culture

In sum, the law-stuff cannot simply be reduced to rule components alone.⁹ What is more, similarities and dissimilarities amongst legal arrangements cannot even be reduced to rule contextures termed as *mentalités juridiques* either (using a notion applied until now exclusively to the self-conflicting contemporary European legal set-up, composed of Civil Law and Common Law regimes¹⁰).¹¹ The realisation of differing legal mentalities lurking behind in the background is part of a larger problem indeed that can only be revealed, I believe, by future inquiries into what I propose to call the ‘Comparative Judicial Mind’ within the larger domain of future analyses in the field of what I mean by ‘Comparative Legal Cultures’.¹²

Unfolding what is inherently working within the judicial ‘black-box’ promises an answer to the query raised in the former paragraph, namely, whether or not the law as the total sum of enactments is one of the (probably determinative) relatively autonomous components of the complex legal network aimed at the regulation and effective control of behaviours or, simply, one of the (probably determinative) signals of cultural expectations formulated in many ways in the complex social patterning network taken in the largest sense, a total sum that can neither stand for nor substitute for the total complex of social patterning (which is to enclose within one framework both cultural determination and the entire process of becoming determined in interaction).

In sum, comparative analysis of the judicial ‘black-box’ is faced with a double task: on the one hand—as motivated by pure theoretical interest—, it has recourse to historical “l e g a l m a p p i n g” , that is, to drawing the

⁹ Cf. Csaba Varga ‘Is Law A System of Enactments?’ in *Theory of Legal Science* ed. Aleksander Peczenik, Lars Lindahl & Bert van Roermund (Dordrecht, Boston, Lancaster: Reidel 1984), pp. 175–182 [Synthese Library 176].

¹⁰ For the expression and its unfolding as a key term, cf., by Pierre Legrand, *Le droit comparé* (Paris: Presses Universitaires de France 1999) 127 pp. [Que sais-je? No. 3478] and *Fragments on Law-as-Culture* (Deventer: W. E. J. Tjeenk Willink 1999) x + 162 pp. [Schoordijk Institute].

¹¹ For their internal variety and richness with a partly heterogeneous historico-cultural potential, cf. *European Legal Cultures* ed. Volkmar Gessner, Armin Hoeland & Csaba Varga (Aldershot, Brookfield USA, Singapore, Sydney: Dartmouth 1996) xviii + 567 pp. [Tempus Textbook Series on European Law and European Legal Cultures I].

¹² Cf. Csaba Varga ‘Comparative Legal Cultures? Renewal by Transforming into a Genuine Discipline’ *Acta Juridica Hungarica* 48 (2007) 2, pp. 95–113 {& <<http://akademaii.om.hu/content/gk485p7w8q5652x3/fulltext.pdf>> }.

available taxonomy of all the variety of past and present legal experiences of *theatrum legale mundi* representing the whole arena of our historical and cultural diversity,¹³ and on the other hand—for the sake of assuring mutual cognition on behalf of all concerned and out of purely practical interest—, it promotes *i n t e r a c t i o n* amongst differing civilisational superstructures, with approaches, conceptual sets and institutions, human sensitivities and professional skills included, in order to widen their horizons in a continued learning process.

5. Complementation by the Law's Self-resolution in Post Modernism

Up to the point reached here, our developments have been grounded on the widely held assumption of classical legal positivism as the appropriate approach to law traditionalised in western civilisation.¹⁴ However, our inquiry must diversify into further paths of research and extended cores of problematisation, also taking into account the materialisation of the law's own (so called) *p o s t m o d e r n c o n d i t i o n s*, under which the new *juristische Weltanschauung* itself will declare (or simply tolerate the hard empirical facts of) the *r e / d i s - s o l u t i o n* of legal positivism (taken in narrow terms as rule-positivism) in a legal regime that asserts itself as thoroughly (α) constitutionalised while also (β) multiculturally (γ) poly-centred under conditions in which (δ) even its eventual codification cannot aim at more than just foreseeing patterns to be considered ($\delta/1$) at the level of principles, ($\delta/2$) as a suggestion of the temporarily best solutions (that may be changed the next time), that ($\delta/3$) openly calls for continuous judicial unfolding and further development (refinement and adaptation);

¹³ Cf., by Csaba Varga, 'Introduction' to *Comparative Legal Cultures* ed. Csaba Varga (Aldershot, Hong Kong, Singapore, Sydney: Dartmouth & New York: The New York University Press 1992), pp. xv–xxiv [The International Library of Essays in Law & Legal Theory, Legal Cultures 1] and, more developed, '*Theatrum legale mundi* On Legal System Classified' *The Romanian Journal of Comparative Law* I (2010) 1, pp. 105–133 or 'Taxonomy of Law and legal Mapping: Patterns and Limits of the Classification of Legal Systems' *Acta Juridica Hungarica* 51 (2010) 4, pp. 253–272 &<<http://akademaii.om.hu/content/9u2w571071085670/fulltext.pdf>>}.

¹⁴ As mirrored by the development of the idea of law-codification and the adventure of its variegated uses and attempts at implementation, cf. Csaba Varga *Codification as a Socio-historical Phenomenon* (Budapest: Akadémiai Kiadó 1991) viii + 391 pp.

or, summarily expressed, (E) the final re/dis-solution of classical legal positivism into what adepts now call 'legal socio-positivism' [*socio-positivisme juridique*].¹⁵ Well, the research in question also has to involve foresight into in what way and how such a new setting (with further ongoing moves also to be considered) has to have a diverting accumulated impact on the tasks judicial law-actualisation has to face in actual court processes.

A further complementary issue and topic of problematisation is set by the emerging international arena as well. This is dedicated partly to those forms that the above re/dis-solution may have in the field of international law proper¹⁶ and partly to forms that the structural arrangement and internal organisation of international humanitarian law will probably establish when it is about to reach its relative completion. For, as is well known, its novel developing structure is based increasingly on the call for a mode of thinking that asserts definite (well-circumscribed) value-preferences in military/civil strategic/tactic planning and execution, rather than on traditional schemes of merely issuing rules of behaviour, a regulatory model historically practiced until now in law. Well, the query focuses here on what repercussions this new method of patterning may and probably

¹⁵ Cf., by Csaba Varga, 'What is to Come after Legal Positivism is Over? Debates Revolving around the Topic of »The Judicial Establishment of Facts«' in *Theorie des Rechts und der Gesellschaft* Festschrift für Werner Krawietz zum 70. Geburtstag, hrsg. Manuel Atienza, Enrico Pattaro, Martin Schulte, Boris Topornin & Dieter Wyduckel (Berlin: Duncker & Humblot 2003), pp. 657–676 as well as 'Meeting Points between the Traditions of English–American Common Law and Continental-French Civil Law (Developments and Experience of Postmodernity in Canada)' *Acta Juridica Hungarica* 44 (2003) 1–2, pp. 21–44 {& <<http://www.akademiai.com/content/x39m7w4371341671/fulltext.pdf>>}.

¹⁶ According to Martti Koskeniemi 'The Politics of International Law' *European Journal of International Law* I (1990) 1–2, pp. 4–32 & in <<http://ejil.oxfordjournals.org/cgi/reprint/1/1/4>>, „Social theorists have documented a recent modern turn in national societies away from the *Rechtsstaat* into a society in which social conflict is increasingly met with flexible, contextually determined standards and compromises. The turn away from general principles and formal rules into contextually determined equity may reflect a similar turn in the development of international legal thought and practice. There is every reason to take this turn seriously—though this may mean that lawyers have to re-think their professional self-image. For issues of contextual justice cannot be solved by the application of ready-made rules or principles. Their solution requires venturing into fields such as politics, social and economic casuistry which were formally delimited beyond the point at which legal argument was supposed to stop in order to remain »legal«. To be sure, we shall remain uncertain. Resolutions based on political acceptability cannot be made with the kind of certainty post-Enlightenment lawyers once hoped to attain. And yet, it is only by their remaining so which will prevent their use as apologies for tyranny.”

will have as regards the development of domestic laws and the diversification of the latter's instruments.

6. The Metaphoric Nature of the Term 'Law'

It can be taken for granted that so long as it is not made clear adequately and to a sufficient depth what law in social existence truly is (that is, what indeed makes it suitable to exert normative effects in the social realms of both the Ought/*Sollen* and the Is/*Sein*),¹⁷ certainly we shall not be in a position to control its conscious planning and shaping, that is, its overall destiny. Until then, we cannot help entertaining ourselves *in re* of law if not in a merely symbolical sense and with a merely metaphorical force, i.e., in the exclusive manner of signalling something as referring to it at the most.¹⁸ When in everyday professional routine we act as jurists, usually we identify

¹⁷ In the context of Georg Lukács *Zur Ontologie des gesellschaftlichen Seins* (Prolegomena, MS in Lukács Archives M/153, p. 253), it is of a criterial importance that "social being" as such can only emerge once the phenomenon in question starts actually exerting specific effects on and in society [e.g., „Das Sein besteht aus unendlichen Wechselbeziehungen prozessierender Komplexe”].

¹⁸ As was already demonstrated by the author—*Lectures...* [note 1], *passim*—, in addition to the ways in which the law shall be treated and applied (as something ready-made),—as a prior issue—the ways in which the law can be produced (e.g., which procedure can result in a law being made, which is fed from what and attains what degree of completion) are becoming conventionalised through the ideology of the legal profession. For we could take it as previously given from our inquiries into the methodology of the formation of legal notions—‘*Quelques questions méthodologiques de la formation des concepts en sciences juridiques*’ in *Archives de Philosophie du Droit* XVIII (Paris: Sirey 1973), pp. 205–241—and into the law’s anthropological foundations—‘*Anthropological Jurisprudence?* Leopold Pospisil and the Comparative Study of Legal Cultures’ in *Law in East and West* On the Occasion of the 30th Anniversary of the Institute of Comparative Law, Waseda University, ed. [the] Institute of Comparative Law [of the] Waseda University (Tokyo: Waseda University Press 1988), pp. 265–285 {& ‘*Law*’, or ‘*More or Less Legal*’ *Acta Juridica Hungarica* 34 (1992) 3–4, pp. 139–146}—that independent of the self-definition and self-provision of the law, there is a constant battle for both its everyday uses and tendential definition ongoing among at least three of its feasible components in mutual rivalry: positing as law / enforcing as law / and popular practicing as law. Accordingly, instead of ‘law’ in general, we can only speak about law with further specification implied, that is, as circumscribing it in and against a multi-factoral continuous movement. Or, in the final analysis, the once simple query for “»what« the law is” is changed now by the sole issue, dialectically hermeneutic and process-like: in which sense the law is properly and actually meant; whether anything meant is meant so either more or less; and if it is meant so at all, then in which phase of either developing to become, or ceasing to have been, a law.

what we mean by the law through its eventually objectified phenomenal forms, that is, through the latter's procedurally due formal enactment, its textual wording, as carrier of what we qualify as legal validity;¹⁹ although, when we act as jurists, we are aware of the underlying fact that this is but a simplistically abbreviated expression, and no criteria set by actually canonised states of an ideology (upheld temporarily by the legal profession) are entitled to substitute for scientific description and definition. This is why the subject and main objective of our present interest in the topic is to circumscribe, as exactly as possible, those necessarily fragmentarily objectified items (composing parts) of the law (necessarily withstanding, of course, definitions pointing beyond the limitingly relativising terms of "in this or that sense" and "more or less", because the stuff of law, linguistically expressed, is the same for law enacted, law enforced, law doctrinally treated in so-called *Rechtsdogmatik*, and law as the scientific object of study), together with the entire social, institutional, and intellectually represented environments of law that, in the final analysis and at any given time, will in their totality create and make up as well as form and shape the law.

7. Added Queries for the European and International Rule of Law

For want of a deepened answer to the above, it is by no means unambiguous what we exactly desire when, for instance, we announce our effort to achieve the harmonisation of laws within the European Union (unifying them by common codification, among other methods),²⁰

¹⁹ Cf. Csaba Varga 'Validity' *Acta Juridica Hungarica* 41 (2000) 3–4, pp. 155–166 {& <<http://springer.om.hu/content/mk0r8mu315574066/fulltext.pdf>>}.
²⁰ Cf., by Csaba Varga, 'La Codification à l'aube du troisième millénaire' in *Mélanges Paul Amselek* org. Gérard Cohen-Jonathan, Yves Gaudemet, Robert Hertzog, Patrick Wachsmann & Jean Waline (Bruxelles: Bruylant 2004), pp. 779–800 {& 'Codification et recodification: Idées, tendances, modèles et résultats contemporains' in *Studia Universitatis Babeş-Bolyai Iurisprudentia*, LIII (juillet-décembre 2008) 2 [La recodification et les tendances actuelles du droit privé Bălţ, 9–12 octobre 2008], pp. 11–29 & <<http://studia.law.ubbcluj.ro/articole.php?an=2008>>} and 'Codification at the Threshold of the Third Millennium' *Acta Juridica Hungarica* 47 (2006) 2, pp. 89–117 {& <<http://www.akademiai.com/content/cv56191505t7k36q/fulltext.pdf>>}, as well as 'Az Európai Unió közös joga: Jogharmonizálás és jogkodifikáció' [The common law of the European Union: Harmonisation and codification] *Iustum Aequum Salutare* IV (2008) 3, pp. 131–150 with an abstract on p. 283 {& in <<http://www.jak.ppke.hu/hir/ias/.htm>> + / „SUMMA - Tartalom”}.

or when, responding to the challenges made explicit by the globalisation process ongoing in our day, we declare our longing for a substantiated respect for ‘the rule of law’ and ‘legality’, both through the further shaping of international law and especially within the decision making processes of international organisations (such as the United Nations).²¹ For nowadays more than dreams are at stake on this global terrain. A firm determination is almost reached that, upon the model offered domestically by constitutional courts, some legal/juristic filtering agent should and shall indeed be built in at/around the peaks of large international organisations (amongst which mostly the United Nations Organisation Security Council is specified by the literature), with a clear intent to control and possibly also efficaciously sanction conformity of the course they are actually taking with the ideal of what is now called ‘the international rule of law’, even if it is by no means thoroughly and reassuringly clarified what exactly is meant by this phrase and how it can be measured within a multi-partnership complex network operated by so various sides and under ever-changing conditions.

II. QUESTIONS TO BE RAISED BY LEGAL ARRANGEMENTS INDIVIDUALLY

8. Law as Subsistence and Law as Conventionalisation

All these developments are preconditions to clarifying the (simultaneously conditioning and conditional) basic issue of what law does indeed subsist in.

The overall query for identifying what, in the final analysis, law consists of and what it is building constantly from can only be detected from its ac-

²¹ Cf., e.g., Brun-Otto Bryde ‘Konstitutionalisierung des Völkerrechts und Internationalisierung des Verfassungsrechts’ *Der Staat* 42 (2003) 1, pp. 61–75 and, for the background, *Legalization and World Politics* ed. Judith Goldstein et al. (Cambridge, Ma.: MIT Press 2001) xv + 319 pp., as well as Richard H. Pildes ‘Conflicts between American and European Views of Law: The Dark Side of Legalism’ *Virginia Journal of International Law* 44 (2002) 1, pp. 145–167. For an overview, see also by Csaba Varga ‘Jogi kultúránk – európai és globális távlatban’ [Our legal culture from a European and global perspective] in *Európai jog és jogfilozófia Tanulmányok az európai integráció ötvenedik évfordulójának ünnepére* [European law and philosophy of law: Papers dedicated to the half-of-the-century of European integration] ed. Máté Paksy (Budapest: Szent István Társulat 2008), pp. 13–42 [Jogfilozófiák], particularly para. 5: »The rule of law«, pp. 25 et seq.

tual operation, that is, from the moves by which it is operated and made to function, that is, from its practical workings (including the ways by which it recurrently reconventionalises its standard or innovative routines), or, in sum, from analysis of the intellectual/mental operations actually effected on/by (while appeals and/or references are being made to) the law. In order to reach an adequate knowledge, we have to reconstruct exactly what it is that, in the final account, is referred to as the law, and indeed, what is the relationship that can be reconstrued through such analyses between its aspects (property, features, etc.) that are referred to as ‘the law’ and the practical conclusion inferred (stated, motivated, and justified mostly by justices) as ‘the conclusion of the law’.

9. Dilemmas of the Law Exhaustively Embodied by Texts, Thoroughly Conceptualised, and Logified

A triple set of questions can be formulated here as queries to be addressed with regard to all the legal traditions and arrangements that can be included at all in such an inquiry. First we should consider whether or not their law is *exhaustively embodied* by their given textual *corpuses*, or are texts, destined only to offer from what to learn the law, mere signals as exemplifications from the law, references to realise how rich the potential hidden in the entire stuff of the law is, or not more ambitious than serving as memo-props or didactic help on desirable or mostly followed practices in the name of the law. Second, the analysis should address whether or not in the medium carrying or lingually manifesting it, the law is also *conceptualised*, that is, the words used are at the same time defined as systemic and taxonomic locuses of a notional network built at varying (adequate) levels of generality with the claim of exhaustive completeness, or, rather, all these are, for want of anything better, linguistically exhibited for the exclusive sake of making communication possible at all on law, with the type of mere naming that only characterises, instead of creating any classification performed within some relatively closed and internally arranged taxonomy. Finally, we should consider whether or not in the intellectual operational series targeting, in the case at hand, achievement of the mutual reflection of the law and the facts constituting the case of it, the claim is formulated and enforced, with the legal decision being derived from the law, as a *logical conclusion* of it (parallel to the requirement of its categorically formal and exhaustive after-the-fact justification excluding any al-

ternative to the decision reached), or logic can only and will in fact remain in the background throughout, playing, if at all, some merely controlling function.²²

**10. *Conservatio/novatio, ius strictum / ius aequum,*
generalisatio/exceptio,
and the Moment of Decision**

This inquiry can be assured by investigating applied legal techniques in quadruple directions that may have developed in each and every legal system to a locally sufficient degree, that is, techniques that, on the one hand, (a) guarantee the need of any given law and order to remain stable and preserved in its identity all along through the continued flow of challenges it is faced with in order to answer the in the meantime, (b–c) produce instrumentalities available as suitable for that change, adaptation, or mere refinement needed at any time to be effectuated, and which, on the other hand, (d) close down the mutual reflection of rules and facts by/upon one another in a way excluding any doubt—mostly through the mere fact (or authority) of the decision taken or the self-comforting cover of its alleged logical certainty.

In accordance with the above, (a) the first of the directions relating to applied legal technicalities moves (by oscillating) between the (frequently simultaneous) opposites of *conservatio/novatio*, with recourse to which partial renewal may, of course, be achieved by interpretation but in most cases only fragmentarily at a given time, as emphatically counterbalanced by the simultaneous conservation of all the other terrains and domains of regulation for a while; (b) the second of the directions (sometimes in parallel to the former) moves (by oscillating) between what is considered

²² For some basic hints, cf., by Csaba Varga, ‘Law and its Doctrinal Study (On Legal Dogmatics)’ *Acta Juridica Hungarica* 49 (2008) 4, pp. 253–274 {& <<http://akademaii.om.hu/content/g352w44h21258427/fulltext.pdf>>} as well as ‘Differing Mentalities of Civil Law and Common Law? The Issue of Logic in Law’ *Acta Juridica Hungarica* 48 (2007) 4, pp. 401–410 {& <<http://akademaii.om.hu/content/b0m8x67227572219/fulltext.pdf>> and ‘Rule and/or Norm, or the Conceptualisability and Logifiability of Law’ in *Effizienz von e-Lösungen in Staat und Gesellschaft* Aktuelle Fragen der Rechtsinformatik (Tagungsband der 8. Internationalen Rechtsinformatik Symposions, IRIS 2005) hrsg. Erich Schweighofer, Doris Liebwald, Silvia Angeneder & Thomas Menzel (Stuttgart, München, Hannover, Berlin, Weimar, Dresden: Richard Boorberg Verlag 2005), pp. 58–65}.

ius strictum / *ius aequum* in the given moment of the ever-developing overall regulatory arrangement, which movement (somewhat modelling the former) may venture either to loosen the original (or derivative) strictness of the regulation in question (mostly in its practical legal consequences) or, vice versa, to fix the original (or derivative) equity available in the actual regulation, in each case preserving the prevailing state of strictness/equity of all the other fields; and (c) a two-way option almost depending on free choice as an evergreen instrumental *trouvaille* of legal technicality is realised by the continuing tension between moves targeting *generalisatio/exceptio*, in case of which conservation/novation and/or strictness/loosening are/is either generalised or made to become an exception (whilst we have to be aware of the fact that, logically from the outset, any change as compared to the original state makes it an exception). Finally, (d) for that the law's abstract normative expectations can be related—projected, then ascribed—to actual facts by performing a formal synthesis unifying the heterogeneities of Ought/*Sollen* and Is/*Sein* in the court's *dictum* that normatively judge sheer facts,²³ an artificially formalised gesture is also required (reminding us of the otherwise a-natural effects of, say, *mancipatio* in Roman law, activated—as an institutional act with normative effects—by an easily memorisable formal human gesture as the *sine qua non* complementation that eventually performs it in law), by means of which, either logified subsumption [*subsumptio*] or discretionally decided subordination [*subordinatio*] will finally be declared by mobilising all the available and freely disposable legal techniques for its demonstration [*justificatio/motivatio*]. This will allow us to officially ascertain the ability to equalise (as well as the ability to reflect and ascribe) either the correspondence or similarity between the two sides, depending on the logical transcription of their connection established.

(It is to be noted that the classical stock of legal technicalities has to be expanded so as to include, for instance,²⁴ techniques of argumentation by basic principles and of the constitutionalisation of issues, as well as recourse to filling gaps in the law or case-specific determination of the meaning of so-called flexible or uncertain terms in provisions.)

²³ This is what a Hungarian classic of legal sociology once termed as *synopsis* for his processual theorising. Cf. Barna Horváth *The Bases of Law / A jog alapjai* [1948] ed. [from ms] Csaba Varga (Budapest: Szent István Társulat 2006) liii + 94 pp. [*Philosophiae Iuris: Excerpta Historica Philosophiae Hungaricae Iuris / Jogfilozófiák*]. Cf. also András Jakab 'Neukantianismus in der ungarischen Rechtstheorie in der ersten Hälfte des XX. Jahrhunderts' *Archiv für Rechts- und Sozialphilosophie* 94 (2008) 2, pp. 264–272.

²⁴ Cf. with para. 5 above.

III. THE CIRCLE OF LEGAL ARRANGEMENTS TO BE INCLUDED IN THE INVESTIGATION

11. Cultures and Traditions to be Investigated

The investigation revolving around the judicial ‘black-box’ is to concentrate (1) on Civil Law & Common Law arrangements, decisive for foreseeing the prospects of their future dis/convergence, which is what is at stake when we aim at the eventual unification of laws within the European Union.²⁵ We do so by surveying also, on the one hand, (1/a) their antecedents, involving the kinds of legal reasoning characteristic of the ancient Greeks and Romans (differentiated amongst themselves according to relevant periods) and, on the other, (1/b) their historical formation within/into their own so called families or groups—separately in the (1/b/α) Latin and Germanic as well as the (1/b/β) Nordic elements—, enlarged to include (1/c) their mixed/mixing branching(s) off in the world (exemplified primarily by Scotland, Québec, Louisiana, and the State of Israel). This has to be complemented by the other part of the diverse world civilisations, namely, by (2) what can be learned about the resolution/settlement of legal conflicts in autochthonous societies, which is probably our common civilisational root culture (with the data of contemporary legal anthropological research and tribal materials included), as well as, nearing the specifically European roots, (3) the classical Jewish and Arabic traditions, contrasted—to signal the available practiced variety of patterns—with at least (4) the Asian tradition exemplified by the Korean, Chinese and Japanese procedures and lastly, as annexed by—as a function of the availability of data and monographic treatments—, for instance, (5) the Persian, Indian, or other tradition(s).

²⁵ Cf., by Csaba Varga, ‘Kultúra és kultúrák az Európai Unióban (Egység-mitosz a hasonlók különbözőése talaján)’ [Culture and cultures in the European Union: The myth of unity supported by divergence] *Jogtudományi Közlemény* LXIV (2009) 3, pp. 93–100 and ‘A kontinentális és az angolszász jogi mentalitás jövője az Európai Unióban’ [The future of civil law and common law mentalities in the European Union] *Jura* [Pécs] 15 (2009) 1, pp. 133–142. As to the above papers and the last ones in notes 20–21, cf. also his *Jogrendszerek, jogi gondolkodásmódok az európai egységesülés perspektívájában* (Magyar körkép – európai uniós összefüggésben) [Legal systems, legal mentalities in the perspective of European unification: Hungarian overview – in an European Union context] (Budapest: Szent István Társulat 2009) 282 pp. [Jogfilozófiák].

IV. THE PURPOSE AND IMPACT OF INVESTIGATIONS

12. The Task's Horizons

The research hypothesis itself addresses important challenges at the frontiers of the field due to the fact that it is grounded on assumptions going substantially beyond the current mainstream state of the art. Its underlying approach to law through the reinterpreted duality of “law in books” and “law in action”, between which the judicial ‘black-box’ (calling for unfolding in the present project) can only erect a bridge opening up quite new horizons, once it is also recognised that the very fact of (alongside the manner in which) exerting social influence constitutes—serving as the basis for—the ontological existence of law.

Thereby, features of law in practice, perceived mostly as either contingently added moments or mere accidents of false consciousness (and, therefore, treated, if at all, epistemologically), are elevated into the unified domain of the law’s very ontology. In parallel with distinguishing the logic of problem solving from that of formal justification, the very notion of legal technique and its usual assessment as a mere accompaniment in instrumental complementation is changed to an unconventionally novel one, with a creative or arbitrary potential able to marshal the process up to its outcome.²⁶ By launching research on ‘the comparative judicial mind’, the concept of “legal mentalities” itself (quite *à la mode* now and quite useful in prophesising regarding the con-/dis-verging prospects of Civil Law and Common Law in the European Union) is transubstantiated into a transdisciplinary notion that can only be described by a long series of multidisciplinary investigations.

Such features of law as its exhaustive embodiment in textures, conceptualisation perfected, or thorough logification, have never been systematically surveyed through historico-comparative inquiries. Moreover, neither they indeed nor their varieties in various legal-cultural settings have been notionised as yet. What I call post modern challenges of and by the law²⁷ is well cultivated in the literature but without having been generalised as parts (or the over-weighty superior part) in any overall *Juristische Methodenlehre* (or juristic methodology). And almost the same holds true for international

²⁶ Cf., by the author, *Theory of the Judicial Process* [note 4] and ‘What is to Come after Legal Positivism is Over?’ [note 15].

²⁷ Para. 5 above.

law, for neither humanitarian methodology nor post positivism's challenge to international regulation has ever been subjected to legal philosophical reflection, generalisation and application up to now.

European endeavours at unifying/codifying/harmonising member states' laws are mostly politically expressed and sectorally advanced in *travaux fore-préparatoires* rather than envisaged in all their possible actual implementations, including their feasible legal-philosophical dimensions. As a matter of due course, 'rule of law' and 'international rule of law' have only been used mostly as catch phrases without theoretical-methodological scrutiny being done in depth, which the present paper proposes to achieve. Accordingly, the conceptualisation itself it is bound to conclude with has to be unconventionally novel.

Or, the impact will be (1) a more differentiatedly complex notion of law in which both the classical positivist and the post positivist positions are transcended by a concept based upon something operated rather than being merely positivized; (2) a *theatrum legale mundi* with a thorough historico-comparative overview of the kinds of judicial minds actively working in all its representative varieties, past and present; and (3) a legal-philosophical substantiation of (a) what can be meant at all (α) by the "rule of law" and "international rule of law" and also (β) by unification, codification and harmonisation of laws, especially in a European Union context; as well as (b) what impact so-called post modern conditions of law expressed by the constitutionalisation of issues and argumentation by principles may have on the future of judicial adjudication in view of the self-strengthening re-/dis-solution of classical rule-positivism; (c/ α) what impact the specific methodology of international humanitarian law may have on other fields of law, including the issue of (c/ β) what impact post modern novelties and humanitarian specificities may have on the understanding and individual identifiability of what is meant exactly by the "rule of law" and "international rule of law".

DOCTRINE AND TECHNIQUE IN LAW*

1. Law, Legal Policy and Legal Technique [243] 2. Formalism and Anti-formalism [245] 3. Law as Potentiality and Actualisation [246] 4. Example: Constitutional Adjudication [248] 5. Legal Imaginability [254] 6. Linguistic Mediation [256] 7. *Rechtsdogmatik* [256] 8. Clauses and Principles [258] 9. With Safety Velvets Built In [260]

1. Law, Legal Policy and Legal Technique

The term ‘legal technique’ has to encompass, in principle, both legislation and the application of law. Although ‘legal technique’ is most often referred to in literature as the instrumental know-how of legislation,¹ for me it is an instrumental skill, covering the entire legal process from making to applying the law. For, in historical times, human civilisation has developed something called ‘law’, as well as something else called ‘legal policy’. The latter symbolises, in a wider sense, the entire social medium in which a community of people, organised in a country, aims at achieving some goal(s) in a given manner through a specific medium. In a narrower sense, legal policy relates to the field of politics as organised partly in terms of legislative power and, together or alongside with it, partly in terms of governmental power (with public administration, including crime control) and, as the third branch of the state power, in terms of judicial power—all working in their ways so that legal positivities can be implemented and actualised

* Presented at the 21st World Congress of the International Association of Philosophy of Law and Social Philosophy at Lund in 2003—[abstracted in] *Law and Politics – In Search of Balance* Abstracts: Special Workshops and Working Groups, ed. Christofer Wong (Lund: [Media-Tryck] 2003), pp. 10–11—& at the *Internationale rechtsinformatisches Symposium* at Salzburg in 2004 <www.univie.ac.at/RI/IRIS2004/Arbeitspapierln//Publikationsfreigabe/Csaba_Phil/Csaba_Phil.doc>. Commissioned but censored out from *Gerechtigkeitswissenschaft* Kolloquium aus Anlass des 70. Geburtstages von Lothar Philipps, hrsg. Bernd Schöne-mann, Marie-Theres Tinnefeld & Roland Wittmann (Berlin: Berliner Wissenschafts-Verlag 2005), and eventually published in *Iustum Aequum Salutare* IV (2008) 1, pp. 23–37 & <<http://www.jak.ppke.hu/hir/ias/20081sz/02.pdf>>.

¹ As a literary outlook, cf., by the author [with József Szájer], ‘Legal Technique’ in *Rechtskultur – Denkkultur* Ergebnisse des ungarisch-österreichischen Symposiums der Internationalen Vereinigung für Rechts- und Sozialphilosophie 1987, hrsg. Erhard Mock & Csaba Varga (Stuttgart: Franz Steiner Verlag Wiesbaden 1989), pp. 136–147 [ARSP Beiheft 35] as well as—

through a series of individual official decisions.² In the final analysis, legal technique serves in fact as a bridge between law as an issue of positivation and its practical implementation as shaped by legal policy considerations.

Nowadays, the designation 'law' is actually used to denote modern formal law. This is categorised in a sequence of concepts and made dependent upon further formalities under the coverage of logic, inasmuch as it builds around itself a quasi-geometric structure in which conclusions have to be deduced and, in some arrangements, publicly motivated and justified as well. However, in contrast with the recurrent image of the law-applying automaton suggested by this pattern, real judges are genuine humans with proper ethos, conscience and morality, who themselves act, too, under the pressure of their actual or targeted identification with a huge variety of further social roles. This is why—despite their professional education and socialisation—judges filter their understandings of the law and of the legal relevancy of facts through their own personalities. As ethical beings, each endowed with a particular belief, world-view and socio-political sensitivity, each may (and, indeed, has to) feel inevitably responsible for his or her decisions and also for what shapes are given to the law by that decision as an existentially decisive contribution.³ For, reminding us of the advance of homogenisation in various aspects (spheres and fields) of human activity, GEORGE LUKÁCS has already pointed out that the dilemma faced by any judicial decision originates as a result of experiencing some real social conflict. It is only the legal profession that, searching for a solution by homogenising this conflict as a case in law, will resolve it in a way so as to present it as an apparent conflict that also will have been responded to by the law.⁴

in a version as commissioned initially—'Technique juridique' in *Dictionnaire encyclopédique de Théorie et de Sociologie du Droit* dir. André-Jean Arnaud (Paris: Librairie Générale du Droit et de Jurisprudence & Bruxelles: E. Story-Scientia 1988), pp. 412–414 and 2^e éd. corr. et augm. (Paris: Librairie Générale de Droit et de Jurisprudence 1993), pp. 605–607.

² Cf., by the author, 'Für die Selbstständigkeit der Rechtspolitik' in *Die rechtstheoretischen Probleme von der wissenschaftlichen Grundlegung der Rechtspolitik* hrsg. Mihály Samu (Budapest: Igazságügyi Minisztérium Tudományos és Tájékoztatási Főosztály 1986), pp. 283–294.

³ Cf., by the author, *Lectures on the Paradigms of Legal Thinking* (Budapest: Akadémiai Kiadó 1999) vii + 279 pp. [Philosophiae Iuris].

⁴ Cf., by the author, *The Place of Law in Lukács' World Concept* (Budapest: Akadémiai Kiadó 1985; 2nd [reprint] ed. 1998) 193 pp., especially ch. VI, para 4.

2. Formalism and Anti-formalism

A few decades ago, GEORGES KALINOWSKI's formalist stand was challenged by the antiformalism of CHAÏM PERELMAN. The rear-guard fight continued for a long time, and in the meantime AULIS AARNIO, ROBERT ALEXY and ALEKSANDER PECZENIK invariably attempted, in their theories of legal argumentation, to balance between logicism and argumentativism, so as to provide some explanation that presents the decisions actually reached in law as ones to be finally inferable with uncompromising consequentiality and coherency from the very law. It was PECZENIK—having adhered, in the beginning, to perhaps the most formalist attitude among the above—who finally arrived at a critical self-limitation, notably, at the recognition and formulation of the fact that, linguistically and as viewed from the aspect of a justifiable logical reconstruction, the final (or any) conclusion in law is eventually nothing other than the product of a logical “transformation” and, in it, of an inevitable “jump”.⁵ For one has to shift from one level of conceptual description (e.g., of the object-language) to another (e.g., of the meta-language formulated by the law), as a result of which the sequence of logical inference is arbitrarily but necessarily interrupted in logic. Resuming the same LUKÁCSian train of thought mentioned above, we may even add that from an analytical point of view, the actual conflict only becomes an apparent one when the judge rids it of its problematic character through the available means of linguistic (re- or trans-)classification, that is, through the act of categorisation within the adopted classification—like a deduction within a given scheme.⁶

For me, the paradigmatic basis of such a reconstruction is that every linguistic expression is ambivalent from the outset, because nothing in our world has coercive force in and by itself. It is to be remembered that hardly half a century ago scholars of law might have felt the paradigmatic basis above to be right when taking a classical positivistic stand. For instance, the Hungarian IMRE SZABÓ in his *The Interpretation of Legal Rules* attempted a methodically unyielding reconstruction. According to him, for the lawyer

⁵ Aleksander Peczenik ‘Non-equivalent Transformations and the Law’ in *Reasoning on Legal Reasoning* ed. Aleksander Peczenik & Jyrki Uusitalo (Vammala: Vammalan Kirjapaino Oy 1979), pp. 47–64 [The Society of Finnish Lawyers Publications D6] and Aleksander Peczenik & Jerzy Wróblewski ‘Fuzziness and Transformation: Towards Explaining Legal Reasoning’ *Theoria* 51 (1985) 1, pp. 24–44.

⁶ Cf., by the author, *Theory of the Judicial Process The Establishment of Facts* (Budapest: Akadémiai Kiadó 1995) vii + 249 pp.

everything is simply given, including law itself. When lawyers come into practical contact with law, they only effect chains of operations on what is already given, eventually approving of, extending or narrowing it.⁷ Yet if the judge might deem that by way of his or her interpretation the judge will have actually added to or extracted from this already given thing, all this shall qualify, if at all, exclusively as the judge's preliminary assumption and interpretative intention but by far not as the given thing in question: through interpretation, the judge can at most declare what qualities have ever been present as existing and prevailing from the very beginning. Consequently, legal technique is an instrument for judges to declare—rather than to create—identities. This is the position of classical legal positivism, which became eroded in Western Europe following World War II, but which for a while became even further strengthened (with the ideological overtone of “socialist normativism” as exemplified by the above instance) in the Central and Eastern European region, owing to a whole complex of LENIN-cum-STALINian and VISHINSKYan inspirations, all rooted back in Western European jurisprudential developments characteristic of the 19th and early 20th centuries.

3. Law as Potentiality and Actualisation

However, my view of legal technique implies—here subjecting the micro-analyses carried out so far to further micro-analyses—just the contrary, namely, that nothing is given as ready-made: our life is an uninterrupted sequence of materialisations from among an infinite range of potentialities. Therefore, in every event when a decision is made, it is something selected that becomes actualised. (It is thus by no mere chance that anthropological case-studies have led to the recognition that the judicial event has become the real life—or test—of the law in American legal thought.) The use of law is also actualisation of the law, and legal technique is a compound made up of feasible and practised forms of how to proceed on and justify in law. And

⁷ Szabó Imre *A jogszabályok értelmezése* (Budapest: Közgazdasági és Jogi Könyvkiadó 1960) 618 pp., especially part III: «Az értelmezés eredménye» [The result of interpretation], pp. 237–325. {Cf., as translations, his *Die theoretischen Fragen der Auslegung der Rechtsnormen* (Berlin[-Ost] 1962), pp. 3–20 [Sitzungsberichte der Deutschen Akademie der Wissenschaften zu Berlin: Klasse für Philosophie, Geschichte, Staats-, Rechts- und Wirtschaftswissenschaften 2] and *Interpretarea normelor juridice* (București: Editură Științifică 1964) 439 pp.}

I do repeat here that every moment contributing to the decision made in law is ambivalent in itself, and nothing is compelling by its mere existence. For we have to know in advance—if only to start at this point the specifically hermeneutic explanation—what the law is, what we can do with it and what we can achieve through its instrumentality in a given culture, so that we can successfully argue with and within it. Or, it is necessarily a given *auditoire*⁸ faced with a real situation of life and, within it, a definite context as well, together with its concrete social, ethical, economic and political implications, in which we can extend or narrow our interpretation and qualification. Or, all this is somewhat similar to the sociological description by KÁLMÁN KULCSÁR of the “situation of law-application”, taken as a socially thoroughly conditioned situation, saturated with moral and all other kinds of considerations, in which any question at all can be raised and answered; in which ideas, presuppositions and alternatives can be reasonably formulated; and within which law in action or, in the final analysis, the eventually historically evolved legal culture of an entire nation, will accept or reject one given alternative, as the manifestation and final declaration of what the law is on a concrete issue.⁹ (By contrast, in SZABÓ’s approach legal technique merely applies the finitely ready-made law, by operating it when declaring a meaning that has—according to him—been assigned to it from the very beginning; consequently, there is nothing genuinely process-like in it that could require a personal position and responsible human choice.)

What is identifiable of law with no prior implementation or judicial actualisation is a potentiality at the most, which can only become anything more through a legal technical operation, when it may already gain an ontological existence (in the sense LUKÁCS used the term), asserting itself by exerting an influence upon social existence.¹⁰ This way, in its everyday functioning, law

⁸ The notion ‘*auditoire universelle*’ was introduced by Chaïm Perelman in his *Droit, morale et philosophie* (Paris: Librairie Générale de Droit et de Jurisprudence 1968) 149 pp. [Bibliothèque de Philosophie du Droit VIII].

⁹ Cf., from Kálmán Kulcsár, ‘A politikai elem a bírói és az államigazgatási jogalkalmazásban’ [The political element in the judicial and administrative application of the law] in *Jubileumi tanulmányok* II, ed. Tibor Pap (Budapest: Tankönyvkiadó 1967), pp. 193–232 and, especially, ‘A szituáció jelentősége a jogalkalmazás folyamatában’ [The significance of situation in the process of law-application] *Állam- és Jogtudomány* XI (1968) 4, pp. 545–570.

¹⁰ If and in so far as we had an elaborated legal ontology, it should be able to define the kind of existence that can exert influence specifically arising from the subsistence and accessibility (i.e., the judicial cognisance) of a norm-text enacted as valid. Legal sociologists (spanning in Hungary, e.g., from BARNA HORVÁTH to KÁLMÁN KULCSÁR) have clarified the

seems to embody two different mediums: a homogenised formal concentrate, on the one hand, and a practical action dominated by felt needs, on the other; and it is their amalgamation that will appear subsequently to the outward world as law converted into reality. In the first decades of the 20th century, it was FRANÇOIS GÉNY in France and JEAN DABIN in Belgium who pioneered describing this metamorphosis as open-chanced in logic (and therefore “magical”¹¹), which is the necessary outcome when a practical response is concluded from a pure form.¹² Or, this is the source of recognition according to which legal culture implies something added that cannot be found in law taken with abstract formality—and this, again, is provided by legal technique. Thus, legal technique is the cumulative effect of intentions and skills, procedures and methods, sensitivities and emphases aimed at producing some given realities (and not others) out of the given *dynamei* in the name and as the act of—and in conformity to—the “law”.

4. Example: Constitutional Adjudication

If all this is true, we may establish that in our recent “constitutional revolution” accomplished under the abstract norm-control of the Constitutional Court of Hungary, in the decisions taken by its justices as to crucial issues of the transition process (ranging from compensation for property dispossessed under Communism to coming to terms with the socialist past in

possible difference and even the conflict within the dual operational mechanism of, on the one hand, enacting norms and, on the other, enforcing them judicially. Empirical surveys on the knowledge of law seem to support the hypothesis according to which knowledge of norms can be most effectively mediated by any actual practice having standing reference to these very norms. See Kálmán Kulcsár *Jogszociológia* [Sociology of law] (Budapest: Kulturtrade 1997), pp. 265–266 and, as quoted, Mark Galanter ‘The Radiating Effects of Courts’ in *Empirical Theories about Courts* ed. Keith O. Boyum & Lynn Mather (New York: Longman 1983), pp. 117–141 [Longman Professional Studies and Law and Public Policy] {& in <<http://marcgalanter.net/Documents/papers/scannedpdf/RadiatingEffectsofCourts.pdf>>}.

¹¹ From a “juristic” perspective, it was Hans Kelsen *Hauptprobleme der Staatsrechtslehre* entwickelt aus der Lehre vom Rechtssatze (Tübingen: Mohr 1911) xxvii + 709 pp., pp. 334 and, especially, 441, to speak of “the great mystery” of the law’s operation.

¹² By François GénY, *Méthode d’interprétation et sources en droit privé positif* I–II (Paris: Librairie Générale de Droit et de Jurisprudence 1899) and, especially, *Science et technique en droit privé positif* I–IV (Paris: Sirey 1914–1921); by Jean Dabin, *La théorie générale du droit* (Bruxelles: Bruylant 1944) viii + 276 pp., part 2: «La méthode juridique», pp. 97–203 in general and *La technique de l’élaboration du droit positif* spécialement du droit privé (Bruxelles: Bruylant & Paris: Sirey 1935) xii + 367 pp. in particular.

criminal law) with a homogenising view developed from the “invisible Constitution”, the justices themselves hypostatized (or construed as a real existence, of a conceptual entity) in order to create a substitute for (or, properly speaking, to disregard and surpass) the written Constitution exclusively in force. Well, those decisions annihilated (as with a kind of axe axing everything to get axe-shaped) rather than answered the underlying great questions calling for matured responses in law; for the Court in fact practically failed to give any genuine answer to the underlying social problems that were to generate these questions. In the name of legal continuity, the rule of law as conceived by Hungary’s first constitutional justices has turned out to be more inclined to develop solidarity with the tyranny of the past than to understand and foster the genuine meaning of the transition as an opportunity to make a new fresh start, by helping a truly socio-political change to progress, as had been widely expected. Actually, they preferred the blind logicism of formalism deliberately disabling itself to laying the genuine foundations of the rule of law by calling for the implementation of its particular ethos and values, in contrast to the perhaps more balanced German or Czech variations of constitutional review that—as appears from some of their momentous decisions¹³—, instead of taking the rule of law as simply ordained from above, cared for it as a common cause, pertinent to the whole society, by responding to the latter’s lawful expectations in merits. If this was a failure in Hungary, it was, indeed, one of legal technique: the failure of the legal profession and of its positivistic self-closure, basically indifferent to the moral and socio-psychological foundations of a genuine rule of law. Indeed, those who, as a result of an encounter with historical incidents, happened to be in the position to decide on law and constitutionality at those moments declined to face the problem itself, unlike their numerous fellows in other countries of the region. Seeing the world in black and white, they subordinated all other values, which were no less crucial, to a single value (in itself doubtless crucial), denying and, thereby, practically excluding the relevance of all further values. It was as if the decision were just a knockout game with a lot at stake (notably, gaining or losing everything), and not a process requiring a rather tiring job of weighing and balancing among values—each of which may need to be considered equally seriously through the art of searching humbly and indefatigably for a feasible and justifiable compromise through exhaustive pondering via hesita-

¹³ Cf. *Coming to Terms with the Past under the Rule of Law* The German and the Czech Models, ed. Csaba Varga (Budapest 1994) xxvii + 178 pp. [Windsor Klub].

tions and long maturing until a final decision can be reached—, rather than a total reduction to a simple act of will, by differentiating away any aspect and argument not fitting into the line of this wilful determination, i.e., an act of reduction to elementary and primitive forms (manifested, by the way, by dicing, as well, or even by showing a thumb turned down).¹⁴

In an earlier paper, I have already described how a change to any law can be effected through either the direct modification of its textual wording or the reshaping of its social interpretative medium, by tacitly reconventionalising the conventions that may give it meaning.¹⁵ Well, this duality explains why the same rule does not necessarily work in the same way in different cultures, or why it is generally not enough, when implementing a reform in society, only to have a law simply imposed or adopted under the push of forceful pressure-groups (like, e.g., a series of race relations acts in the United Kingdom¹⁶ or the regulation of nationalities and minorities issues in the so-called successor states created by the dissolution—in terms of the post-WWI Peace Treaty—of historical Hungary). Maybe there is a third, alternative path as well, afforded by shaping further specific legal techniques so as to be able to bring about changes in the long run, without even modifying the law's texture or its social conventionalisation (e.g., as

¹⁴ Cf., by the author, 'Legal Renovation through Constitutional Judiciary?' in *Hungary's Legal Assistance Experiences in the Age of Globalization* ed. Mamoru Sadakata (Nagoya: Nagoya University Graduate School of Law Center for Asian Legal Exchange 2006), pp. 287–312 {enlarged into 'Creeping Renovation of Law through Constitutional Judiciary?' in his *Transition? To Rule of Law? Constitutionalism and Transitional Justice Challenged in Central & Eastern Europe* (Pomáz: Kráter 2008), pp. 117–160 [PoLiSz Series 7] & 'Transition Marshalled by Constitutional Court Dicta under the Cover of a Formal Rule of Law (A Case-study of Hungary)' *Central European Political Science Review* 9 (Summer 2008), No. 32, pp. 9–48} as well as 'Rule of Law – At the Crossroads of Challenges' *Iustum, Aequum, Salutare* I (2005) 1–2, pp. 73–88 {& <<http://www.jak.ppke.hu/hir/ias/20051sz/20051.pdf>> & in *Legal and Political Aspects of the Contemporary World* ed. Mamoru Sadakata (Nagoya: Center for Asian Legal Exchange, Graduate School, Nagoya University 2007), pp. 167–188 as well as 'Rule of Law: Challenges with Crossroads Offered' *Central European Political Science Review* 10 (2009) Spring, No. 35, pp. 42–68}.

¹⁵ Cf., by the author, 'Law as History?' in *Philosophy of Law in the History of Human Thought* ed. Stavros Panou, Georg Bozonis, Demetrios Georgas & Paul Trappe (Stuttgart: Franz Steiner Verlag Wiesbaden 1988), pp. 191–198 [ARSP, Supplementa 2].

¹⁶ Cf., by the author, 'A jog és korlátai: Antony Allott a hatékony jogi cselekvés hatáiról' [Law and its barriers: Antony Allott on the limits of effective legal action] *Állam- és Jogtudomány* XXVIII (1985) 4, pp. 796–810 {partially also as 'The Law and its Limits' in his *Law and Philosophy* Selected Papers in Legal Theory (Budapest: ELTE "Comparative Legal Cultures" Project 1994) xi + 530 pp. [Philosophiae Iuris], pp. 91–96}.

part of modernisation strategies through the law, recurrently analysed by KULCSÁR¹⁷).

5. Legal Imaginability

It was during the first debate in Hungary on how to come to terms with the past under the rule of law that I realised (in responding to the preconceived reservations of GYÖRGY BENCE, both initiating and at the same time side-tracking the debate)¹⁸ that there may be some deep truth in what RENÉ DEKKERS used to allude to in his time: that is, conceivability in law is by no means simply a function of the law itself but is as much one of society-wide understanding and interpreting what law ought to be, in constant dialogue with what the law is. This is to state that what can be rationally and logically justified is also mostly feasible in the law. Or, as PERELMAN concluded from an analysis of historical instances as methodologically evident:¹⁹ providing that socially properly weighty considerations prevail, society can (together with the legal profession and legal academia) indeed mobilise the means of rational justification with proper logical standards so that the necessary and available effect is eventually also legally reached.²⁰

And as HANS Kelsen in his later age reconsidered his theory of law-application, in terms of which the prevalence of legal qualities (lawfulness, constitutionality, etc.)—not their “existence” but the very fact that (as a result of the act of qualification by a competent agent in the law) the “case” of such qualities is officially established or construed—is never one of a quali-

¹⁷ Kálmán Kulcsár *Modernization and Law* (Theses and Thoughts) (Budapest: Institute of Sociology of the Hungarian Academy of Sciences 1987) 198 pp. and in his *Jogszociológia* [note 10], ch. VI, para 3: »A modernizáció és a jogalkotás« [Modernisation and legislation], pp. 221–257.

¹⁸ In *Visszamenőleges igazságszolgáltatás új rezsimekben* [Retroactive justice in new regimes] ed. György Bence, Ágnes Chambre & János Kelemen [published as a manuscript] (Budapest: ELTE BTK Társadalomfilozófia és Etika Tanszék 1990) [FIL 2 Gyorsszimpozium] & *Világosság* XXXI (1990) 8–9.

¹⁹ First of all, André Vanwelkenhuyzen ‘De quelques lacunes du Droit constitutionnel belge’ in *Le problème des lacunes en droit* publ. Ch. Perelman (Bruxelles: Bruylant 1968), pp. 339–361 [Travaux de Centre National de Recherches de Logique] and—as a framework—Chaim Perelman *Logique juridique* Nouvelle rhétorique (Paris: Dalloz 1976) 193 pp. [Méthodes du Droit], pp. 76–79.

²⁰ As a background, cf., by the author, *Transition to Rule of Law* On the Democratic Transformation in Hungary (Budapest: Eötvös Loránd University “Comparative Legal Cultures” Project 1995) 190 pp. [Philosophiae Iuris].

ty existing *in se et per se* but the function of an act in procedure by a procedural actor with proper authority, that is, the consequence resulting from a decision. Furthermore, neither incoherence nor contradiction *in se et per se* can be found in law.²¹ Well, translating the message of all this to our question here, we may conclude that the circumstance that some proposition apparently running against a legal provision is in principle excluded from the law only means—in the language of the KELSENian (eventually processual) normativism—that I, as an official actor in procedure, cannot declare openly that the proposition I am just introducing officially in the law runs against the same law.

The interest of GÉNY and DABIN was aroused precisely by their recognition of the importance of legal techniques, in that such techniques provide instruments for the lawyer to build constructions, in terms of which what is conventionally and determinedly preferred by important sectors of society to be achieved (guaranteed, etc.) will also be legally feasible (conceivable and realisable) in principle, at least in average cases. It was during my first visits to the Czech Republic, then, later, to Israel and then to the United States (especially after the terrorist attack of September 11), while studying their professional texts (including the legal and political substantiation of their claims, and the latter's argumentation and styling), that I felt that in some organically self-building societies a social substrate may develop, in the womb of which (at least in certain key fields such as the national survival strategy and other especially sensitive areas) a nation-wide consensus can historically crystallise regarding those issues they have for long and determinedly been wanting to realise. Further, sharing a tacit awareness of it, mechanisms also may develop to work for its optimum attainment tirelessly and even through detours if necessary, always returning to the main track; and these societies do mostly develop by becoming structured enough (in their entirety, as to their professions and media, etc.) that, eventual external and internal strains notwithstanding, their dominant will can eventually prevail.

The interest of GÉNY and DABIN was awakened precisely by the whirling theoretical perspective of the realisation that law—expressed with an out-

²¹ Cf. by the author, 'No Logical Consequence in the Normative Sphere?' in *Law, Justice and the State* Proceedings of the 16th World Congress of the International Association for Philosophy of Law and Social Philosophy (IVR), Reykjavik, 26 May–2 June, 1993, III: *Problems in Law* ed. Arend Soeteman & Mikael M. Karlsson (Stuttgart: Steiner 1995), pp. 31–37 [Archiv für Rechts- und Sozialphilosophie, Beiheft 60].

sider's cynicism—depends on its cultural (“hermeneutical”) environment to such an extent that—speaking in extremes—almost anything, as well as its opposite, may have a chance of equally standing the test of the law; this, of course, not through any kind of a formal violation of the law but, quite to the contrary, due to the exceedingly sophisticated elaboration of the proposed solution, after having constructed (with deepened comparative and historical knowledge, consciousness of past experience and uses of channels of argumentation once proven successful) all the bridges of argumentation. So that it is possible to achieve, for instance, that by the end of a mandatory dependence and through the extending generalisation (by no means customary in cases of punitive retaliation with civilised nations) of a law (the continuation of validity of which is expressly denied by the one-time colonising power but re-asserted as a validity allegedly inherited by the successor state), collective responsibility is instituted and/or extraordinary coercive sanctions are meted out with lasting and irreversible effects, with-

²² According to analyses born on the British side—e.g., Martha Moffett *Perpetual Emergency A Legal Analysis of Israel's Use of the British Defence (Emergency) Regulations, 1945* (Ramallah: Al-Haq 1989) 92 pp. [Occasional Paper 6] and Lynn Welchman *A Thousand and One Homes Israel's Demolition and Sealing of Houses in the Occupied Palestinian Territories* (Ramallah: Al-Haq 1993) 140 pp. [Occasional Paper 11]—, the British mandatory authorities in Palestine expressly revoked the order introduced in 1937 (on the model of the summary orders the British authorities issued when faced with public disturbances in Ireland in the 1920s) and re-issued in 1945 two days before the expiry of their mandate, with the decree of the *Palestine (Revocations) Order in Council*, 1948, on May 12, to be effective from Midnight of the next day. This is debated by the other side, because this revoking act was not published in the then-official journal, the *Palestinian Gazette*. However, as the former side, the British claims, this has never been a condition for British monarchical acts to be valid. Anyway, the reference to this legal constraint as inherited by the State of Israel was expressly rejected by the state referred to, when eventually Foreign Secretary WILLIAM WALDEGRAVE declared, in the name of the Government of Her Majesty, that these emergency orders had been “repealed long ago and are not part of British law”, and Lord GLENARTHUR shifted the responsibility for its continuing application after the revocation in question to the applier, by saying that “[i]f the Israelis now seek to apply the same or similar regulations, that is their decision for which they must take responsibility.” [*Hansard Official Records: House of Commons* (22 December 1988), p. 665, as well as *House of Lords* (15 December 1988), p. 1113]. For that matter, § 11 of the *Law and Administration Ordinance (Amendment) Law*, promulgated by the *Knesset* [in *Laws of the State of Israel I* (1948), p. 7], had indeed deleted from the legal system in 1949 those laws before the formation of the State of Israel that were passed during the period in question without being published—despite the “obligatory or customary” procedure—in the then-official journal. With this, however, the State of Israel re-asserted the effect of a law about which, back in the time of the British mandate, when that law had been used against the settlers, DOV JOSEPH,

out the protection of either procedural guarantees or judicial control, as a legally justifiable preventive measure.²²

6. Linguistic Mediation

Behind all these considerations concerning the simultaneity of applicative and creative effects of the so-called law-applying process, there is a stimulating strain that prevails between living language(-use) and the blind (and in itself empty) logicism of a system homogenised through a formalising filter. And the significance of legal technique and the inevitably magic transformation effectuated in any legal process may become comprehensible only in the moment when we realise that law is not simply made up of rules, as in themselves they are nothing but mere symbols of logical abstractions. For anyone wishing to reasonably communicate with others cannot but use categories already interpreted in communication with others. Thanks to its reserves, language offers paths and ways how to proceed, although, if examined more closely, these are extremely uncertain signals, full of ambiva-

later Israeli Minister of Justice, had set forth that, with the enforcement of “collective responsibility”, “[a]ll of the six hundred thousand settlers could be hanged for a crime committed by one person”, and another future Minister of Justice, YAACOV SHAPIRA had declared outright that it was “unparalleled in any civilized country. Even in Nazi Germany there were no such laws”, for its orders were found by a later Judge of the Israeli Supreme Court, MOSHE DUNKELBLUM, too, to “violate the basic principles of law, justice, and jurisprudence” [all quoted by Sabri Jiryis *The Arabs in Israel* (Beirut 1976), pp. 11–12]. For the whole complexity of the issue, see the follow-up through balanced analyses in John B. Quigley *Palestine and Israel A Challenge to Justice* (Durham & London: Duke University Press 1990) viii + 337 pp., especially on pp. 30–31, 102–104 et seq. Cf. also Michael Saltman ‘The Use of Mandatory Emergency Laws by the Israeli Government’ *International Journal of the Sociology of Law* 10 (1982), pp. 385–394 and Lisa Hajjar *Courting Conflict The Israeli Military Court System in the West Bank and Gaza* (Berkeley & London: University of California Press 2005) xxiii + 312 pp., Yehezkel Lein *Civilians under Siege Restrictions on Freedom of Movement as Collective Punishment* (Jerusalem: B’tselem 2001) 65 pp. and *In a Dark Hour The Use of Civilian during IDF Arrest Operations: Israel, the Occupied West Bank and Gaza Strip, and the Palestine Authority Territories* (Washington & London: Human Rights Watch 2002) 23 pp. [The Middle East and North Africa, 14/2]; as well as—for the background—*The Rule of Law in the Middle East and the Islamic World Human Rights and the Judicial Process*, ed. Eugene Cotran & Mai Yamani (London & New York: I. B. Tauris 2000) x + 180 pp., especially chs. 3–5 and *Walking the Red Line Israelis in Search of Justice for Palestine*, ed. Deena Hurwitz (Philadelphia: New Society Publisher 2002) xvi + 208 pp.

lence. This is a circumstance that is, of course, not especially striking in everyday usage, that is, speaking in terms of pure logic, after the gaps left by such signals are completely filled in through our everyday conventions and conventionalisations. Law conceived as a rule in the ontological reconstruction of linguistic mediation is just a medium being incessantly formed through a series of interactions, and legal technique serves as just a bridge helping the lawyer to reach a concrete and definite legal conclusion.

Language provides a means for us to express and receive messages, a means that does not label itself. No matter what I say, all I can do is only to indicate (perhaps even mistakenly or misleadingly) at what level, in what layer and whether conceptually or in some other way I do so. And the meta-reconstruction by those whom I have addressed will approve of or modify—i.e., interpret—it anyway. That is, linguistically transmitted information always is labelled subsequently and retrospectively, upon the basis of our mutual comprehension at any time, that is, upon the basis of contexts constructed and construable exclusively by us in view of the aims of the given communication.

Consequently, the aspiration of any objectivist approach to designing law as able to carry on independent, sovereign, unequivocally comprehensible and by no means individually specific clear messages is indeed the principal motive force of modern formal law in its development at any given time. As is well known, judges distinguish their judicial quality from their common selves by wearing powdered wigs and specific robes when they act as a judge, and, as a result of their socialisation, they also wear such ritual signals of this differentiated self when this allusion does not appear physically, as the symbolic particularity of their clothing, but only in each judge's own way to act as a decision-maker in law. Yet, the formal logifying claim that concrete norms as applied to concrete facts are deduced from abstract norms is by no means naturally given but is—irrespective of its actual social support—an artefact made by a normative requirement as the internal rule of the legal game, which, however, can only be asserted in some specifically given micro- and macro-sociological situation, in the definition of the field of meaning of which the judge also takes part inevitably with his or her entire personality, and, in this definition, subtle shifts of emphases, indiscernible in themselves, may also add up to definite shifts of direction in the long run.

All this means that endeavours to create *homogenisation* and *unambiguity* go hand in hand both with the incessantly continuous attempt to reach these in practice and their necessary stumbling in new

heterogeneities and ambiguities, that is, with a continuous tension that constantly maintains both the strain (in theory) and the attempt (in practice) to resolve this once and for all. As if hyperbolic curves were at stake, we are fighting for definite aims but meanwhile we are also moving away from them, unavoidably making detours again and again. Or, the sphere of action of the judge is certainly limited but in terms in which what and how is also ambivalent. For we place artificial human constructions into a homogenising medium in order to apply its rules to them. However, we cannot entirely separate these human-made constructs from the naturally given heterogeneous environment of their usages; consequently, in each moment and operation, their eventual partial definition by real-life situations will also be inevitable.

7. Rechtsdogmatik

The only way available to the legislator to act is to produce a text and, at once, also label it, as if proclaiming to the outside world: Behold, law, that is, a norm-text, valid and effective according to the law's own rules, has hereby been promulgated. In ancient Iceland, for instance, laws used to be recited by the law-speaker standing on a rock amidst the folks' gathering, and from it loudly declaring what the law's formal consequences were.²³ Modern formal law surpasses this level of practical action in as much as its doctrinal aspirations do not stop at actuating a set of norms as mere texts; it formulates, with the help of a series of linguistic and logical operations, a conceptual system from their amalgamate, too. The doctrine emerging from this is again not a readily given result but a process itself. It is what we are socialised in; thus, we, as lawyers, also shape it to some extent incessantly. Consequently, we suppose from the outset—and rightly so—that when we are establishing or applying a rule, we all resort to conceptual instruments refined to a systematic set in the doctrine. That is, there is a specific kind of co-operation to be seen both at the level of linguistic signs and at the meta-level of the commonality of meanings in defining the rule. So, if any one of us says anything about the law, the other will understand something similar or comparable to what the former might have meant by saying it, thanks to our common professional socialisation, doctrine and practice, all

²³ Cf., e.g., Sigurður Línal 'Law and Legislation in the Icelandic Commonwealth' *Scandinavian Studies in Law* 37 (Stockholm: Jurisförlaget 1993), pp. 55–92.

acquired, mastered and further shaped in common by us, even if this deep cultural embeddedness of meanings cannot be found in the linguistic formulation itself. Or, to explain more precisely, if this natural environment of meaning is neither represented in the signs themselves (semiotics) nor in their strictly defined and generalisable meanings (semantics) but does feature exclusively in the practice of language use (praxeology), this amounts to a statement that, ontologically speaking, only actual use is able to give actual existence to it all. That is, it is language through which we communicate but, meanwhile, we do operate in fact with concepts elaborated to their systemic completion in the reconstructive language that stands above the object-language as a meta-language, presumed as actually signified by it.²⁴ Well, it is just the doctrinal study of law that forms the second level, which has in common with legal techniques that both are (supposed to be) applied whenever law is referred to in practice.

The doctrinal study of law, too, has a technique of its own, obviously. All these and similar techniques are certainly interrelated but are far from being identical. As was once established by BRONISŁAW WRÓBLEWSKI (the professorial father of our friend who recently passed away), the law and its doctrinal study, as well as legal scholarship and the law in practice, all have their own languages that are discernible from each other;²⁵ and, as we may conclude from this, similarly, these various techniques have partly differing stores of instruments, too. As is well known, JHERING and SAVIGNY equally emphasised back in their time that the techniques of the doctrinal study of law follow a basically theoretical model, as patterned in both theological dogmatics and other thoroughly formalised systems of mental representation; or, jurists do employ the logical instruments of conceptual analysis first of all. At the same time, it should be remembered that the phenomenon I have earlier in this paper referred to as techniques with an effect resulting in a magical transformation in practice does not obviously suggest any priority guaranteed to the instruments of logics, for it has presented the techniques of law as basically techniques of reasoning. It is characteristically the medium of reasoning within which we may want to restrict or expand

²⁴ See *Jog és nyelv* [Law and language] ed. Miklós Szabó & Csaba Varga (Budapest: [Books-in-Print] 2000) vi + 270 pp. [Jogfilozófiák] and—as an additional background—Miklós Szabó *Trivium* Grammatika, logika, retorika [Grammar, logics, rhetorics] (Miskolc: Bíbor Kiadó 2001) 264 pp. [Prudentia Juris 14].

²⁵ Bronisław Wróblewski *Język prawny i prawniczy* [Language of law and of lawyers] (Kraków 1948) v + 184 pp. [Prace Komisji Prawniczej Polskiej Akademii Umiejętności 3].

the field of application of a rule, in light of the understanding of given practical issues and contextures. However, it is not simply casually any longer, but as—and within—the description of the notional relationships among rules and thereby also of the texture of actual regulation, that conceptual analysis re-formulates—by means of conceptual differentiation and classification, induction and deduction (etc.)—the notional set of the law's categories, as constituents of a mentally represented system.

8. Clauses and Principles

Regarding the very *logic* of law, it is quite symptomatic that while the dominance of formal inference makes its way uncompromisingly, in any case it will turn out that all this may remain valid only for routine cases of the average. For as soon as feasibility to follow the routine of conceptual categorisation becomes questioned in a borderline case (classifiable or not into a given category), logic, too, becomes at once irrelevant, as it has no message whatsoever specific to borderlines that may transcend the bounds of everyday routine in practice. This is why my bewilderment as a first reaction calmed slowly down to melancholy from outrage when I was first appalled to realise that in the case of clauses governing the proper use of rights in civil codes, essentially the same thing is at stake as in the case of the *sine qua non* criterion that the deed must display an actual danger to society, taken as a conceptual prerequisite of criminal acts in the general part of penal codes. Notably, what is striking here is that the special parts of the codes usually call for a relentlessly logical application of the regulation broken down systematically from principles to rules and rules to exceptions—to the exclusion of only a single case, namely, when applicability of such a general clause or principle from somewhere in the general part of the code emerges. For instance, in socialism, whenever any grounds for suspicion of a case of either abuse of rights or lack of actual danger to society emerged, all the stuff of the strict and minutely detailed regulation offered by the entire special part of the code at once became non-applicable as irrelevant, with the questioned case judged in almost a legal vacuum, with the sole

²⁶ Cf., by the author, 'Liberty, Equality, and the Conceptual Minimum of Legal Mediation' in *Enlightenment, Rights and Revolution* Essays in Legal and Social Philosophy, ed. Neil McCormick & Zenon Bankowski (Aberdeen: Aberdeen University Press 1989), ch. 11, pp. 229–251.

reference to one or another general principle laconically drafted in the general part.

Passing over the actuality of typical abuses by the practical annihilation of the law in socialism,²⁶ we are to characterise legal technique as a specific store of instruments by which all these features have been present in any legal culture from the very beginning, alongside the conclusion that the above paradox of the law's demand for strict conformity except in cases of out-of-routine situations left in a barely limited wilderness (involving a self-contradiction of quite an ontological nature) is and does remain a symptomatic property of any law indeed. Notably, attempts are first made to homogenise law in order to depersonalise its application; at the same time rather loosely formulated clauses (in form of flexible, evaluating, etc. concepts) are introduced into it so that, eventually, anything and everything can be legally put away by being dispensed with, if needed. For the end-result will display a genuine paradox indeed: vaguely defined clauses are asserted so that by resorting to them, the judge may forbear to apply the most minutely elaborated sets of the same law's rules.²⁷

Albeit a sad aspect of our question is how socialism actually used to misuse such clauses when it denied entrepreneurial initiatives civil law protection on the pretext of abuse of rights or when it retaliated against friendly private gatherings of old monks and nuns dispersed from their disbanded monasteries by qualifying them as abusing the right of assembly. Notwithstanding that, all this does not in the least alter the fact that every living culture of law incorporates clauses into its order for the same very reason and in its own manner: namely, to prevent those applying the law from being forced to resort to a rigid application of rules in certain borderline cases not properly specifiable legally in a way leading to nothing but social damages and a shaking of the popular trust in legal justice; that is, formulated otherwise, leading to an apparently correct application, allowing the lawyerly self-conceit nothing but

²⁷ A similar logic can be seen in the DWORKINian breakthrough (as contrasted to the positivism of H. L. A. HART), which took a start with the recognition that no matter how self-evidently complete and exhaustive a set of rules derivable from precedents seems to be, its applicability cannot be taken as granted even in apparently relevant cases either, as actual social considerations and prevailing judgements of values may rival these rules by actualising general principles, perhaps latent in the system but now making them operative, in a way that excludes the relevancy of application of a given rule (providing, e.g., *in re* of inheritance by the murderer of a testator or the limitation of liability by a hazardous plant) for adjudication of the given case as well as prospectively. Ronald M. Dworkin 'The Model of Rules' *University of Chicago Law Review* 35 (1967) 1, pp. 14–46.

a Pyrrhic victory. For instance, the clause relating to public order (primarily in public administration) has at all times aimed exactly at bringing about a balance like this—quite until it finally fell into disuse in the wake of the movement of false liberalisation individualising and eventually atomising society.

9. With Safety Velvets Built in

As regards theoretical foundations, I recall what social ontology has revealed about the dialectics inherent in any real process, that is, the practicality of solving conflicting interests and the methodological discrepancies necessarily involved in and by it. Each motion presupposes some kind of counter-motion. Accordingly, not even homogenisation is conceivable without simultaneous re-heterogenisation. Or, expressed more simply, law is too serious a thing to leave to *beaux esprits* or moral heroes to solve genuine conflicts in life, especially under limiting conditions. Safety valves have to be built into the law's networking system as well, from the very beginning. Perhaps legal history can also prove that the first formalisations ever had were already accompanied by clause-like de-formalisations.²⁸

First of all, as is well known, it is the manner of structuring legal techniques that differentiates the pattern characteristic of Common Law from that of Civil Law. It is so much so that a few decades ago Hungarian scholars could hardly imagine (and not because of socialist ideological self-closure but of their stubborn adherence to classical—pre-war—Civil Law professional deontology) that the very fact, characteristic of Common Law, that judgements are passed based only on precedents and that rules governing the adjudication are only de-

²⁸ First, when conflicts emerged, such de-formalisations could operate as a principle of the presumed order inherent in law, then as one posited also increasingly.

²⁹ For instance, socialist compendia of legal history used to excel in such a generation of easy (but consciously misconceived) criticism, as a Bolshevik exemplification of ideological class struggle. For topical examples how this practice may have hindered even theoretical reconstruction, see, by the author, 'A »Jogforrás és jogalkotás« problematikájához' [To the problems raised by {Vilmos Peschka's monograph on} »Source of Law and Law-making«] *Jogtudományi Közlemény* XXIV (1970) 9, pp. 502–509.

³⁰ See, e.g., as just two specimens from continental responses, the reservations made by Eugen Ehrlich *Freie Rechtsfindung und freie Rechtswissenschaft* Vortrag (Leipzig: C. L. Hirschfeld 1903) 40 pp. and Gnaeus Flavius [Hermann Kantorowicz] *Der Kampf um die Rechtswissenschaft* (Heidelberg: Carl Winter 1906) 49 pp., or the reaction by Benjamin N. Cardozo *The Nature of the Judicial Process* (New Haven, Conn.: Yale University Press 1921) 180 pp. [The Storrs Lectures], Lecture III.

clared in the process itself, does by no means imply a scene with everyone at each stage acting according to a *mihi placet* choice.²⁹ As is to be remembered, the famous provision of the Swiss *Zivilgesetzbuch* in its para. 4 had already aroused world-wide outrage when it was just a draft. What self-renunciation of codification ending in a confused administration of justice would it result in if judges could decide as if they were to legislate in a given case?³⁰ Well, it is due to the balanced legal culture of the Swiss—and not to the provision's technical formula—that it has in fact become one of the provisions most rarely applied and with the greatest moderation in the world.

Obviously, legal technique is itself a many-edged and almost omnipotent weapon: anyone may use it to achieve almost anything in any direction. However, we can only proceed on within a given legal culture and by its conventions; this, from the very beginning, delineates and constantly re-delineates the actual limits of what we can conclude and from what. For example, in the logical culture of the Oxford-type conceptual analysis, authors ranging from JEAN-PAUL SARTRE in France to TAMÁS FÖLDESI and JÁNOS KIS in present-day Hungary have been accustomed to deducing with unscrupulous conceptual certainty when one is allowed to kill his/her comrade, mother, or foetus.³¹ Although it may seem as if one's act committing or avoiding murder depended on nothing but a logical inference, we have to be aware that although many things can be proven on paper, in real-life situations anyone with a healthy psychological condition does not do anything prompted by a few indications on a piece of paper. For, in general, we think in a more complex manner, relying—beyond the presumed Pure Reason—on our additional skills, endowments and abilities as well. After all, there is a background culture behind us (much more sophisticated than the above presumption), saturated with instincts, emotions, traditions and past and present habits, and enriched by community practices and experiences, as well.

We live in the same culture, with both vague clauses guiding us to nothing in any concrete situation and rules calling for strict application. And if, in the name of a law, either dysfunctionality, due to the law's blind enforcement, or, despite the law's formal assertion, practical negation, will arise,

³¹ E.g., Jean-Paul Sartre *L'Existentialisme est un humanisme* (Paris: Nagel 1946) 141 pp. [Pensées]; Tamás Földesi *Erkölcscről mindenkinek* [On morals to everyone (Budapest: Móra 1978)] 2nd rev. ed. (Budapest: Kozmosz 1981) 287 pp. [Én és a világ]; János Kis *Az abortuszról Érvék és ellenérvék* [Pros and cons on abortion] (Budapest: Cserépfalvi 1992) 236 pp. Cf. also, by the author, *Lectures...* [note 3], pp. 91–92.

the reason is not necessarily to be sought for in the given technical procedure. For it is known to all of us that practical life, with the entire network of subsystems within it, is operated by the same human involvement and social activity, after all. In case political considerations would unduly overwhelm the law's operation, they can just as well utilise any instrument they have access to, in order to subject the law to them.

Democratic legal culture serves not only as a veil to support any decision desired but also as one of the most distinguished media through which values inherited and continuously accumulating in society are developed—first clashing, then rubbing and polishing, and finally being reconciled in harmony with one another—in order to become, through experiencing the patterns, channels and cultures of reasoning offered by that professional culture, a genuine mediator, serving as one of the most effective factors of social culture.³²

³² The problems addressed at the workshop on “Intermediateness and decision: the fundamental issues of the political and legal theory of Carl Schmitt”, organised by the Faculty of Law of Eötvös Loránd University in Budapest on November 22, 2002, focussed on the interdependence, moreover, interlacing confluence in one real-life process of the logic taken as a pre-coded automatism, on the one hand, and the moment of *decisio* as a sovereign resolution responding to a given situation, on the other. Cf., by the author, ‘Change of Paradigms in Legal Reconstruction (Carl Schmitt and the Temptation to Finally Reach a Synthesis)’ in *Perspectives on Jurisprudence* Essays in Honor of Jes Bjarup, ed. Peter Wahlgren (Stockholm: Stockholm Institute for Scandinavian Law 2005) [= *Scandinavian Studies in Law* 48], pp. 517–529 {& *Rivista internazionale di Filosofia del Diritto* LXXXI (ottobre / dicembre 2004) 4, pp. 691–707}. As a summary of the underlying wider problem of how mere forms can be made liveable with substantive reason or goal-orientation in implementation, cf. also, by the author, ‘Goals and Means in Law’ in <<http://www.thomasinternational.org/projects/step/conferences/20050712budapest/vargal.htm>> {& *Jurisprudencija* [Vilnius: Mykolas Romeris University] (2005) 68(60), pp. 5–10}, originally prepared as ‘Buts et moyens en droit’ in *Giovanni Paolo II Le vie della giustizia: Itinerari per il terzo millennio* (Omaggio dei giuristi a Sua Santità nel XXV anno di pontificato) a cura di Aldo Loiodice & Massimo Vari (Roma: Bardi Editore & Libreria Editrice Vaticana 2003), pp. 71–75.

THEORY AND PRACTICE IN LAW

On the Magical Role of Legal Technique^{*†}

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“The *Sollen*, the form of norm of a hypothetical proposition, is in most cases therefore not the component of the positivized legal order but the *a priori* normative-logical basic form of it.”

(István Losonczy

A funkcionális fogalomalkotás lehetősége a jogtudományban

{The availability of functional concept-formation in jurisprudence}

[Budapest: Királyi Magyar Egyetemi Nyomda 1941], p. 65)

1. Legal Formalism in a Practical Context

According to the classical understanding, *l e g a l t e c h n i q u e* covers the entire process from law-making to law-applying, in contrast to the sim-

* Originally prepared for and published in *Emlékkönyv Losonczy István professzor halálának 25. évfordulójára* [Festschrift in memory of the 25th anniversary of the death of Professor Losonczy] szerk. Gál István László & Kóhalmi László (Pécs: [Kódex Nyomda Kft.] 2005), pp. 314–326 [Studia Iuridica Auctoritate Universitatis Pécs publicata 138]. For an earlier version in English, cf. in *Acta Juridica Hungarica* 47 (2006) 4, pp. 351–372 & <<http://www.akademiai.com./content/j4k2u58xxk7rj6541/fulltext.pdf>>.

† I respectfully dedicate this paper as a tribute to the memory of Professor ISTVÁN LOSONCZY, of whom I feel privileged to have had the opportunity to be a student. He proclaimed the duty of perpetual intellectual renewal, which he also consistently realised in his own oeuvre of legal philosophy. See, as relating to a segment of my present topic, his own one-time evaluation in József Szabadválvi ‘Széljegyzetek Hans Kelsen magyarországi recepciójának történetéhez: Losonczy István Kelsen-interpretációja’ [Commentaries to the history of Hans Kelsen’s reception in Hungary: István Losonczy’s interpretation of Kelsen] *Sectio Juridica et Politica* [Miskolc] XXIII (2005) 1, pp. 125–140.

plification by some recent literary elaborations, which would handle it as an instrumental know-how of legislation only. However, as so-called law-making becomes actualised through law-applying by gaining a definite meaning with a primary significance in it, it is basically still the range of problems connected with law-applying that is at stake here. Or, we might say: there is something that is law, on the one hand, and there is something that is legal policy (denoting the entire mesh of social interconnections within which a country seeks to achieve something), on the other, and legal technique is meant to serve as a bridge between the two.

In our present-day understanding, in the final analysis law is a profession in the service of conceptualities framed in given ways and composition as wrapped into a rigidifying formality, characteristic of the law's modern formal ethos, with logicity and formalistic entrenchment as decisive features by now. That is, formal law builds around itself a system to be treated and referred to with a kind of geometrical ideality, and it demands a model of justification that is usually required only for drawing theoretical conclusions. Notwithstanding all this, in reality the judge is by no means an entity simply reducible to a logical automaton but a being permeated with all the qualities and fullness of any human existence. So even if he is covered by the robe particular to his role, he keeps on irrevocably carrying out all his further social roles as well. While attempting—in compliance with his professional expectations—to disregard everything falling beyond the competence defined for his profession, he is aware that he takes responsibility for his decision and thereby also for the way he is shaping living law, by putting his ethical ego to the test.

Perceiving the specificity of the function to be filled by law in the gap between the law's social embeddedness and apparently formal automatism, GEORGE LUKÁCS described the process as the way that the judge has to face a genuine social conflict, which is also communicated to him as a controversy in a legal sense, that is, as the logical contradiction of opposing claims, supplied by the parties to the case. However, his profession is made a lawyerly craft or art exactly by his ability to find a sufficiently formulated solution in law that can refine the controversy to an illusory and transcended conflict, solved in and by the law.¹

¹ Lukács György *A társadalmi lét ontológiájáról I–III* [Zur Ontologie des gesellschaftlichen Seins] (Budapest: Magvető 1976) as well as, by the author, *The Place of Law in Lukács' World Concept* (Budapest: Akadémiai Kiadó 1985) 193 pp.

And the question of what goes on meanwhile was described by the analytical attempt at reconstruction by ALEXANDER PECZENIK over the past decades,² summed up in the notions of “transformation” and “jump”. Thereby, his doctrinal explanation turned into a self-contradiction, as in the wake of the classic debate between GEORGES KALINOWSKI and CHAÏM PERELMAN, representing the positions of formalism and anti-formalism (which debate ended conclusively for me with the legal relevance and explanatory force of the latter),³ he opted for formalism, having declared inexorably the need that decisions be deducible, that is, logically unambiguously inferred. As a result of his failure with regard to this very issue, eventually he arrived at a self-critical (and in view of formalism, also self-annihilating) self-restriction, which he introduced exactly due to the notions of “transformation” and “jump”, by proving the repeated forced interruption of any logical chain in legal reasoning. Otherwise speaking, he regarded that which has become an illusory and transcended conflict, in the above sense, out of the controversy as the result of necessary conceptual transformation(s) which therefore involve a jump in the logical derivation—that is, a categorical evaluation (through reflecting the abstract normative patterns onto the fragmentary but qualified description of the facts of the case, taken out from a compound life situation), at the completion of which the judge may finally declare that the matter has become reassuringly clear for him, allowing him to

² Aleksander Peczenik ‘Non-equivalent Transformation and the Law’ in *Reasoning on Legal Reasoning* ed. Aleksander Peczenik & Jyrki Uusitalo (Vammala: Vammala Kirjapaino Oy 1979), pp. 47–64 [The Society of Finnish Lawyers Publications, Group D6] as well as, by the author, *Theory of the Judicial Process The Establishment of Facts* (Budapest: Akadémiai Kiadó 1995) 249 pp.

³ It was the purely theoretical philosopher PERELMAN who expressed as his astonishing opinion that it was enough of legal philosophers and it was also high time for lawyers to come and explain the process—just like the centipede in the story who was asked how he could walk with hundred legs (and afterwards he could not take one single step but just pondered how he could nevertheless walk)—, and we ourselves had to finally reconstruct from the lawyers’ narratives what actually went on and how. At the end of all such reconstructions, legal technique would turn out to be capable of the world’s most genuinely creative achievements. And, finally, it was on such a basis that he could state that our European continental legal ideals were not just outdated but had nothing indeed to do with reality, as they only constituted the mere facade of a professional ideology with extremely creative acts going on behind the scene. In more details, cf., by the author, ‘On the Socially Determined Nature of Legal Reasoning’ *Logique et Analyse* (1973), Nos. 61–62, pp. 21–78 & in *Études de logique juridique* V, publ. Ch[aim] Perelman (Bruxelles: Bruylant 1973), pp. 21–78 [Travaux du Centre National de Recherches de Logique].

reach his judicial conviction so that he can already decide in the given way by rejecting any other alternative(s). Of course, from now on it is also visible that this endpoint no longer presumes a creative act in a logical sense. Therefore, once the jump has taken place in the transformation, that which—so to speak—follows will from then on also derive obviously with logical formality and necessity.

The paradigmatic basis of such a multiple professional attitude is provided by the recognition that in both language and law, everything is ambivalent and nothing is compelling in itself. This is just the antipode of the foundational idea of IMRE SZABÓ's work on *The Interpretation of Legal Rules*,⁴ written half a century ago as an emblematic epitome of socialist jurisprudence, according to which the law is given a definite meaning from the outset and it is only in relation to this that interpretation may approve, extend or restrict a proposed meaning. But if everything is given from the beginning for those who apply it at any subsequent time, then legal technique, described as above, would generate something differing from that which has been given originally. That is, within the perspective of normativism, the judge will necessarily misuse his authority if he extends or confines the law's vigour beyond or within its originally defined scope. On the other hand, in the theoretical perspective outlined above with a focus on legal technique, in reality there is nothing that could be given. It is only a constantly ongoing materialisation, actualisation and implementation that we can perceive. After all, there is nothing but a judicial event in the course of which a decision is taken and something will be actualised by this decision.⁵ Or, things become actualised through the actual uses of the law. And in this respect, legal technique indeed seems to be an all-embracing concept, used as good for almost anything that may stand the judi-

⁴ By Imre Szabó, *A jogszabályok értelmezése* (Budapest: Közgazdasági és Jogi Könyvkiadó 1960) 618 pp. {& *Interpretarea normelor juridice* (Bucureşti: Editura Ştiinţifică 1964) 439 pp. & *Die theoretischen Fragen der Auslegung der Rechtsnormen* (Berlin 1963) 20 pp. [Sitzungsbericht der Deutschen Akademie der Wissenschaften zu Berlin: Klasse für Philosophie, Geschichte, Staats-, Rechts- und Wirtschaftswissenschaften 1963:2]}.

⁵ This is what WRÓBLEWSKI commented upon by stating that interpretation is either of a static or of a dynamic ideal. That is, the interpreter either constructs a conceptual world, by claiming that it testifies to the original meaning, and then all we have to do is try to reconstruct it by all means, or we conceive of the responsible judicial profession as free, and formulate a task of adaptation for ourselves within it. Cf. Jerzy Wróblewski 'The Problem of the Meaning of the Legal Norm' *Österreichische Zeitschrift für öffentliches Recht* XIV (1964) 3–4, especially pp. 253–266 at pp. 265 et seq.

cial test through reconsiderations in appeal, until sealed by the legal force. If we ponder repeatedly, for instance, classical legal principles, then our interpretation can indeed so to speak freely be expanded or narrowed as a function of the particular circumstances involved in the establishable facts of the case and, therefore, in a way scarcely influenced by abstract conceptual limitations but only judgeable on the plane of the actual and the concrete. In view of this, KÁLMÁN KULCSÁR once had good reason to assert in his legal sociology decades ago⁶ that there is at all time an individual (albeit sociologically generalisable) *situation of law application*: we have to decide at any time within the boundaries of an in-itself complete and unlimited situation of legal argumentation and reasoning, in which also our morality, our idea of man and of course even our concept of the Divine may have a role—in addition to all other considerations. For it is an *open situation*, at least in a sociological sense, in which thoughts and alternatives of solution are formed while finally, as represented by the individual judge (and as a function of his sociologically describable hierarchical dependence and further circumstances), eventually an entire lawyerly community will have something accepted or rejected (within the confines of the prevailing legal culture and its institutional operation).

In contrast to the view represented by, e.g., SZABÓ above or to the reifying conception of usual simplifications, in legal technique (operating law while actualising a meaning to it) there is no before or after. For that which is given earlier cannot be but sheer potentiality [*dynamei*] as it can exclusively acquire something of an ontological existence in a LUKÁCSian sense through a practical legal operation, that is, as operated by the applied legal technique. Consequently, it is from the outset two different media (and, through them, the intertwining of heterogeneous aspects) that are at stake and in play in law. There is a concentrated *form*, on the one hand, and a *practical action*, inseparable from everyday existence and driven by practical considerations, on the other—and these two media are being continuously amalgamated. That which will in its own way emerge out of this as the message of the law arises at any time exactly from this amalgamation.

⁶ Kálmán Kulcsár 'A szituáció jelentősége a jogalkalmazás folyamatában' [The significance of the situation in the process of law-application] *Állam- és jogtudomány* XI (1968) 4, pp. 545–570.

2. Magic in Law: Culture and Mediation

It was FRANÇOIS GÉNY, having revealed the moment of enchantment in a specific legal operation with techniques that may render available almost anything and its opposite, who did the most for the description of the process in law actually ongoing at the turn of the 19th to 20th centuries. JEAN DABIN was the first to reconsider the issue in the subsequent decades.⁷ DABIN had already raised awareness of the fact that there is some kind of a magical process taking place in law. For in fact, law is hardly more than a kind of *open-ended mediation through pondering*. In such a complex, there is a properly formulated form we usually call ‘law’ but this is far from being the end-point. This is something that will have to transform into any given and definite message through the practical life of (the) law.

The conjecture and the figurative message of the circumstance that the law is not something to arrive at but something *from which* the overall specific move starts (a “path” that “channels” argumentation and reasoning in law) denote only the beginning of the recognition that, in this case as well, there may also exist something as legal culture, as a perhaps even more comprehensive and decisive notion than legal technique is. For it is legal culture that provides for the medium in which legal techniques can be selected at all. For instance, two early decisions of the Hungarian Constitutional Court, on compensation for damages caused by the Communist regime and on facing the crimes of the totalitarian past, dealt with basic dilemmas of (to be addressed on the merits as a *sine qua non* prerequisite to) any genuine transition from Communist dictatorship. Yet, with its formalistic decision *a limine* rejecting those cases, actually the Court annihilated the original claims themselves, instead of contributing to their solution. One of the characteristics of such and similar decisions, which practically eliminated any chance of a fundamental socio-political transformation, was precisely that, by having squeezed them into the sublime robe of “constitutionality” with some formal allusions to the Constitution’s wording on equality before the law in a Republic being based on the democratic rule of law, in fact the Court declined even to face the underlying social problem that should have been solved. Therefore, if and in so far

⁷ François GénY *Science et Technique en droit privé positif* I–II (Paris: Sirey 1913–1930) and Jean Dabin *La technique de l’élaboration du droit positif spécialement du droit privé* (Bruxelles: Bruylant & Paris: Sirey 1935) xii + 367 pp.

as the activism of the Constitutional Court, relying on the in-advance awareness of the legal force of all those acts that it may have arrived at in its free discretion without a compelling legal basis, was a fiasco in Hungarian history, we have to consider it the failure of the entire legal culture behind the legal techniques applied. That is, our legal profession in general and our lawyerly elite in particular indeed refused to assume those tasks of legal interpretation and legal technical operation (placing—by making use of legal principles, as the case may be—the law's formal regulation into deeper and broader contexts) that the legal professions of other nations, more sensitive to their nations' fate and at least morally more responsible and responsive (e.g., in Germany or the Czech Republic), did in fact assume.⁸

As became clear to me during the completion of one of my earlier papers (as I struggled with the dilemma of whether or not the law is reducible to a system of enactments'), *l e g a l c h a n g e* may have at least a dual path: it may take place either by a direct modification of the provisions concerned (this is classical legislation) or by re-shaping the hermeneutic medium of interpretation behind the rule. Or, legal change may be *d i r e c t* and *i n d i r e c t*. In the latter case, reconditioning and altering the law's field of meaning, that is, the social conventionalisation that gives it a meaning, will bring about a practical modification of the message of the law. Of course, such a duality of feasible strategies may entail interactions, including crossing effects. For instance, the impact may be rather questionable when acceptance of a regulation (which the given society is not ready by far to receive) is only due to force or a plot, lobbying or political blackmail. In case of inflicting a regulation aimed at (e.g.) protecting national minorities merely by (external or internal) pressure on an otherwise intolerant com-

⁸ Cf., e.g., *Coming to Terms with the Past under the Rule of Law* The German and the Czech Models, ed. Csaba Varga (Budapest 1994) xxvii + 178 pp. [Windsor Klub]. In 'Worlds Apart: Western and Central European Judicial Culture at the Onset of the European Enlargement' *The American Journal of Comparative Law* LII (Summer 2004) 3, pp. 531–567, Zdenek Kühn analyses the obstinate sterility of the survival of the skills and work-patterns reminiscent of the age of socialist legality, that is, the practical ignorance of legal principles and the aversion to undertaking democratic decision-making—in brief, the lack of familiarity with, and genuinely participatory experience in, the jurisprudential style developed since the end of WWII in Western Europe—, which is indeed responsible for the threat this posed to the European Union through our EU-accession.

⁹ By the author, 'Is Law A System of Enactments?' in *Theory of Legal Science* ed. Aleksander Peczenik, Lars Lindahl & Bert van Roermund (Dordrecht, Boston, Lancaster: Reidel 1984), pp. 175–182 [Synthese Library 176] & *Acta Juridica Academiae Scientiarum Hungaricae* 26 (1984) 3–4, pp. 413–416}.

munity, no success can be guaranteed by itself. A lasting change can scarcely be implemented in a legal culture once pushed into a difficult situation, if the whole society with its legal professionals will continue to block any tolerance in the future. Meanwhile, reconsidering the range of problems underlying the present paper, we can add a new feature. Notably, an intention to strategically change the message of the law (e.g., in the frame of modernisation through the law) may also be provoked by the long-term re-selection of the legal techniques applied, without either formal modification of the rules or informal re-shifting of the social conventionalisation behind those rules. Accordingly, there is another indirect mode of changing or reforming the so-called living law.

3. Legal Conceivability and its Limits

To emphasise the decisive extent to which legal technique may shape the law's practical purport,¹⁰ let me refer to RENÉ DEKKERS, who in his time arrived at the conclusion that, properly speaking and in the final analysis, legal conceivability is mostly not a function of the law itself. For finding a solution conceivable in law or ensuring a path promising to lead to a given result in law scarcely means anything other than whether we are able rationally, through applying given legal techniques, to defend a certain standpoint better than others would another (or, in case of some pressing interests, we can defend it at all), with the logical demand for perfection that is usual in the given legal culture. Or, in the final analysis, what is at stake here is just justifying a given solution—with the exclusion of its rejection from the outset. Referring to historical examples, partial analyses of the multitude of Western European and Anglo-American (etc.) practices (known to be used to set legally high and sophisticated standards, by the way) show such a diversity that we have to conclude at least that the demand for legal conceivability is the limiting condition so as not to admit openly and with explicit textual formulation to be running against the text interpreted. And therewith the developments by HANS KELSEN on discretion and the mo-

¹⁰ See, e.g., by the author, 'Doctrine and Technique in Law' *Iustum Aequum Salutare* IV (2008) 1, pp. 23–37 {& <<http://www.jak.ppke.hu/hir/ias/20081sz/02.pdf>> & <www.univie.ac.at/RI/IRIS2004/Arbeitspapierln/Publikationsfreigabe/Csaba_Phil/Csaba_Phil.doc>.

ment of the legal force¹¹ present themselves in a new setting—namely, instead of logical consequences, a lack of procedural rejection, and, as a final criterion, instead of the positive statement of logical inclusivity, a negative inertial force of the fact that the decision in question has not been actually annulled or overruled by being expelled from the circle of the accepted regime of law and order in the legal process.

As can be seen, the arsenal of legal techniques definitely grants lawyers discretionary power to conclude—precisely due to the inherent ambivalence of any text—that, in the final account and in marginal situations, that which the basic social conventions of a nation's culture consider important and vital enough to form a foundational component of its survival strategy will not be inconceivable *ab ovo* in most cases. This is what can be strikingly observed especially in times of crisis and above all in countries and epochs where and when a high-standard background culture of *self-defence* with the powerful representation of national interests has developed and is being persistently cared for; in particular contrast to the fatigue and enervation of living aimlessly from day to day with no perspective or ability to do one's utmost for good causes, a condition that can unfortunately be seen in the life of our nation, exhausted by the post-1956 repression and the strange transition from it. For examples of a vital impulse with a determination to survive are numerous from the Czech Republic to Romania and Ireland, or from the State of Israel to the United States of America. To be clear, it is the use of techniques and the ability to react by adequately responding to challenges that I mean here and now, rather than whatever emotional relation, sympathy or identification. After all, all this does not necessarily imply more than the issue of whether a social substrate has ever developed, a substrate that is able to decide (without debates generating discord internally and the very impossibility of performance externally) what the nation wants at all, at least in strategic directions and on the most sensitive fields; whether a kind of mechanism has evolved to facilitate having basic expectations, even if unsaid, be tacitly agreed upon; whether the societal background is structured in a way that some dominant will can be formulated at least on given fields, and if necessary, also asserted to prevail—even if through most diverse paths and by roundabout means but, all

¹¹ Cf., e.g., by the author, 'A bécsi iskola' [The school of Vienna] in *Jogbölcsélet XIX–XX. század: Előadások* [Lectures on legal philosophy in the 19th to 20th centuries] ed. Csaba Varga (Budapest: Szent István Társulat 1999), pp. 24–32 [Bibliotheca Cathedrae Philosophiae Iuris et Rerum Politicarum Universitatis Catholicae de Petro Pázmány nominatae].

things considered, even defying obstacles if needed.¹² Based on the analysis of cases and from a certain historical perspective, all this is relevant as—in want of any other point of reference—we have to see that if properly significant interests are at stake as represented at proper levels, practically anything and its opposite may have a chance of passing through the institutional test of legality in practice. And referring again to Kelsen's wisdom in his theoretical reconstruction, this by no means necessarily can be achieved through any spectacularly flagrant defying of the law but just by building up those bridges of reasoning (based on scholarly comparative-historical analyses in depth and the lawyerly talent in analysis, argumentation and inventiveness) that may render the solution in question conceivable in the given culture under given circumstances.¹³

4. One Language, Unlabelled

The primary lesson of all this may be summarised as no matter how exciting and flexible our language is, in itself and as a mediator, it is not suitable for definition. By *legal technique*, in fact, we mean the standardised set of instruments of how to handle a certain language in a lawyerly way. Rules may involve norms (norms themselves being nothing but projections of logic, logifying denominations). Whether we act as philosophers or as linguists or lawyers, we have to apply categories of distinction in order to enter into an intelligible communication at all. Looking methodologically behind what we commonly call law, we can scarcely claim more than this: in the world of the intellectual construct called 'law', so-called norms, mediated by conceptualities defined in rules, offer certain sets with paths of, and menu-references in, procedures within the institutional process generated by the same law—together with all the ambivalences inherent in its linguistic mediation. But this is just the recognition that LUKÁCS once characterized in his social ontology as the trap of mediation, witness to the

¹² I attempted to clarify the components of such a favourable or unfavourable disposition through a comprehensive analysis in my opening lecture ['«Worthy of the fate, qualified for the challenge»: On the state of our intellect and scholarship' (in manuscript)] of a seminar for Hungarian history teachers in the Carpathian Basin, organised by the Rákóczi Association in the Benedictine Abbey of Pannonhalma during the summer of 2004.

¹³ Which may have even led, e.g., to collective responsibility instituted with reference to a law that had lost its effect yet was still allegedly surviving, in the heritage of an earlier mandate rule. See note 10.

basic unity that prevails nevertheless, despite the world's artificial fragmentation through its human intellectual representation. For language is a medium incessantly formed—including the law's and lawyers' language—, and unceasingly re-conditioned by each and every actor of the law's community in general and its dedicated professionals in particular, who actualise it while processing cases through its filter at any given time.

According to our starting point, we all speak a language and language does not label itself. Any of us can say, for example, that now he enters the terrain of scholarship, by incorporating new conceptualities into this scholarship. Well, such an allegation may prove true (or verifiable) and false (or refutable) alike, as any of us may at any time expound in a meta-level reconstruction that the sequence of deduction has been false or that nothing but passions, or uncontrollably visceral affections/aversions, have been expressed in the guise of conceptuality, i.e., in a basically nonconceptual language-use. Or, one can at all times identify a meta-system superior to all our linguistic communications, based upon which new explanations may be formed about what has been told.

The language's failure to label itself does also involve the perspective that, according to official expectations at least, the more differentiated the society we live in, the less the law-applier's distinctively individual personality will have a share in making his decision, and this is exactly the most decisive factor in the judge's performance of his function—whether he still wears his powdered wig visibly or it is present only hidden in his professionally socialised subconscious. Within himself, the judge has to distinguish between his individuality and his function defined for his legal quality. Yet no matter how unambiguous this is at the level of theory or formalised ideology, we have to reckon with the fact that any such official expectation is hardly more than a normative *desideratum*, that is, the law's internal rule for its own game to be played (apart from the underlying social requirement, which does not inevitably enforce itself). The duality inherent in this apparent antinomy is verified by sociological reality. Because insofar as the law is seen as a field of giving meanings, in the shaping of which we all play a role (especially via our professionally competent lawyers), then, whether we want it or not, that field will necessarily be actually shaped by individual human beings through the filter of their own personalities. All this entails the secondary effect (also described by LUKÁCS) that shifts of emphasis and changes of context, perhaps invisible in themselves, will inevitably emerge in the ontological process of our social actions, which may eventually add up to some decisive shift(s) of direction

in the long run. That is, our professionalism, with our lawyerly ideology and skills in legal operation, will distinguish and homogenise us according to the requirements of the legal complex and to our understanding of the roles suited to it, on the one hand, but nevertheless, the unity and the individual expression of all these in our personalities and fullness of being are ontologically still inseparably present, on the other; and therefore, we can only try to separate aspects differing in homogeneity within the heterogeneity of such an ontological unity of existence for the sake of and within analytical purposes exclusively. The point under discussion may remind one of the stand taken by LUKÁCS who, having pondered the tension between the sought-for unambiguity and actual ambiguity of language, characterised the development of civilisation and scientific thought over thousands of years as an implied fight to make language unambiguous, while basic objectives in practice are often realised in a hyperbolic way at most. Notably, we usually set a goal and approach it however we can; yet, meanwhile, new divergences are inevitably being introduced into the process—and the same thing happens to the judge as well.

Or, the judge's personality and his individual character, together with the linguistic ambivalences pervading mediation in all its forms—all these leave their marks on every operation. What we claim here is that in every artificial human construction there is some kind of homogenisation that at the same time carries its counterpoint. For example, in our civilising efforts we place the law and the range of social problems to be addressed as legal into a well-separated and thoroughly homogenised sphere, to which the legality of the law's domain can already be directly applied. Nevertheless, we still cannot tear the whole process from the heterogeneity of its human carrier, which will inevitably lead to its overall definition by overall life conditions, that is, by all the particularities of the historically given *hic et nunc*.

As we have seen, language does not label itself, and it would be downright unfit to do so. And yet we all speak a language, apparently the same language in the same community. The legislator is to write (after having read), and the law-applier is to read (and then, also to write). More than a thousand years ago, in Iceland, the law was announced by the *lagsaga* [or *lögsögumaður*] reciting it standing on a rock. This may have been a practical gesture in itself, yet our present-day reconstruction may rightly regard it as something more: objectification, externalisation, rendering its factuality an independent act. It is such an objectification upon which, in our present-day complexity of modern formal law, we have built a new professional as-

piration, the so-called doctrinal study of law [*Rechtsdogmatik*], aimed at having a conceptual system formed out of what was told by the legislator and interpreted in authoritative practice. All this having been incorporated in our culture, today we presume almost by habit that, after the law was drafted by one of us as a governmental specialist, voted for by others of us as members of the parliament, commented on by yet another of us as a legal scholar, taken into account in legal transactions by others of us and, in the end, applied by the last of us as a judge in a conflict still arising between some of the former; well, we indisputably presume in our culture that all of us use conceptual instruments and, accordingly, understand texts and messages just in the way conventionalised in our culture. Therefore, if any of us says “purposefulness”, this has to mean what our commentary and standing practice understand as ‘purposefulness’. Of course, the exchange in communication of social understanding and feedback is not coded in the text, and the speaker is mostly unaware of the complexity of the layers behind a textual meaning, as he only spoke a language. Yet the meta-system of the language of conceptual reconstructions, superimposed upon language as we use it in our everyday life, asserts itself even in roundabout ways, assuming an in-depth and in-volume more comprehensive concept behind the actual language usage. It is this role in which the doctrinal study of law proves to be a non-excludable mediator.¹⁴ And it is within the perspective of this context that we can state that legal technique, too, is non-excludably present anywhere where there is law with a practical use.

No need to add that the doctrinal study of law has its own technique(s), too, of course. RUDOLF JHERING and CARL VON SAVIGNY described as early as the second half of 19th century that this technique suggests a basically theoretical model—like that customarily used, for example, in theological dogmatics and similar fields of scholarship—, where only the logical instruments of conceptual analysis (starting out from given texts) and conceptualisable evidence or axioms are utilised. Consequently,

¹⁴ MARX and ENGELS may have rightly written in *The German Ideology* in the above sense that the Germans have once drowned their misery in scholarship, and what they failed to achieve through revolution they finally built up in theoretical doctrine. It is worth mentioning that a similar duality prevails in Anglo-American culture as well, but there the judge’s conscience plays this role. Therefore the real issue is to whom to allocate the power of the doctrine. For what is a scholarly-made doctrinal study of law for us in the European continental (German) pattern is the practical construction from case to case in the Common Law. Cf., e.g., P. S. Atiyah *Pragmatism and Theory in English Law* (London: Stevens 1987) xii + 193 pp. [The Hamlyn Lectures].

the analytical apparatus of the doctrinal study of law applies mostly classical types of logical operations, including, above all, conceptual division and classification and, of course as assigned to these, deduction and induction. Notwithstanding this, what we have told about the *m a g i c a l t r a n s - f o r m i n g e f f e c t* of legal technique is not built on the primacy of logifying instruments but sees in law basically a technique of argumentation. According to this, the various forms of argumentation (with the help of which the judge, by considering various presumably feasible positions more or less relevant in one sense or another, gets closer to answering the dilemma of the applicability of various rules) appear as elements of the legal technique he applies.

5. Formalisation and De-formalisation: Principles as Safety Valves

It was in an explication written three decades ago on the function of law and its correlation to the function of codification¹⁵ that I came to realise that in socialism the acknowledgement of rights only within the function of their “proper” exercise as manifested in the Civil Code had the same function as categorising a deed’s danger to society as the criterion of criminal offence had in the Penal Code. However, my initial political indignation calmed down to silent melancholy later on, when I also realised that this is nothing more than the quite common jurisprudence based upon so-called *c l a u s - e s*, which is in fact of the same age as legal culture. It is precisely the LUKÁCSian symptom already mentioned in connection with linguistic ambiguity that re-emerges here. Notably, in our civilising development, we are trying to limit discretion by the means of law, in order to prevent the judge’s personality—along with the irrational factors included, as well as the factors ensuing from differing rationalities—from affecting the judicial discernment. At the same time, we incorporate clauses of immense generality into the system so that the judicial assessment, bound in this way, can nevertheless be freed and the otherwise relevant legal provision put aside, if needed, in any unforeseeable borderline situation at any time. It is precisely this issue that RONALD DWORKIN thoroughly discussed in his famous es-

¹⁵ Cf., by the author, ‘The Function of Law and Codification’ in *Anuario de Filosofía del Derecho* 7 (Madrid: Instituto Nacional de Estudios Jurídicos 1973–1974), pp. 493–501 {& *Acta Juridica Academiae Scientiarum Hungaricae* 16 (1974) 1–2, pp. 269–275}.

say—"Is Law a System of Rules?"¹⁶—, which has risen by now to be the paradigmatic cornerstone of Anglo-American legal thought. In his opinion, the challenge of creativity begins exactly when the judge, stepping out from his self-comforting everyday routine, finds that the judgeability of his case is problematic and, as such, requires re-consideration. This is the culmination of the complex socio-legal determination of the judicial process, when the law-applier may identify a legal principle emerging from either the Roman law's common heritage or domestic jurisprudential precedents, and once the latter's relevance is established, he will forbear from applying minutely elaborated sets of rules.¹⁷ Of course, we may have distressing memories about the socialist use of the clause on the proper exercise of rights,¹⁸ for instance, when the political police retaliated harshly on the sociable gatherings of banned elderly monks as an abuse of the right of assembly. However, it must not be forgotten that the simultaneous cult of clauses had, in principle, the same aim in Western Europe, namely, to foresee the unforeseeable. Otherwise speaking, there is neither legislation nor living legal culture without incorporating clauses according, of course, to the prevailing cultural patterns. Such were, for instance, the concepts of "common good", "public order" (etc.),¹⁹ used in fields ranging from public administration to civil and criminal law in the West, which in the last decades unfortunately seem to have lost their primacy, on account of false liberalisation and individualistic anarchism.²⁰

¹⁶ Ronald M. Dworkin 'Is Law a System of Rules?' [1967], reprinted in *The Philosophy of Law* ed. Ronald M. Dworkin (Oxford & New York: Oxford University Press 1979) 176 pp. [Oxford Readings in Philosophy], pp. 38–65.

¹⁷ In this sense, we might as well say that the gap is in us at the most, that is, any problem that there may be is attributable to the applier of the law, because the legal order is perfect in the form it is made available to us. That is, the cause of problems may be that until now we have failed to activate it in the sufficient depth, exploiting its classical theoretical foundations.

¹⁸ For an overview in the background, cf., e.g., Gianmaria Ajani 'Formalism and Anti-formalism under Socialist Law: The Case of General Clauses within the Codification of Civil Law' *Global Jurist Advances* 2 (2002) 2 [Article 4] in <<http://bepress.com/gj/advances/vol2/iss2/art4/>>.

¹⁹ Cf., above all, Vera Bolgár 'The Public Interest: A Jurisprudential and Comparative Overview of the Symposium on Fundamental Concepts of Public Law' *Journal of Public Law* [Emory University Law School] 12 (1963) 1, pp. 13–52.

²⁰ Cf., e.g., by the author, 'Rule of Law – At the Crossroads of Challenges' *Iustum, Aequum, Salutare* I (2005) 1–2, pp. 73–88 {& <<http://www.jak.ppke.hu/hir/ias/20051sz/20051.pdf>> & in *Legal and Political Aspects of the Contemporary World* ed. Mamoru Sadakata (Nagoya: Center for Asian Legal Exchange, Graduate School, Nagoya University 2007), pp. 167–188 and as 'Rule of Law: Challenges with Crossroads Offered' *Central European Political Science Review* 10 (2009) Spring, No. 35, pp. 42–68}.

Providing that we consider such resolutions problematic, we inevitably have to presume an ontology in which unidirectional definition is available in the field of social action. In comparison to such simplistic thinking, the thoughts developed by LUKÁCS proved to be far more differentiated. His explication in the opposite direction was built exactly on the presumption that there is no motion without *c o u n t e r - m o t i o n*; therefore it is not realistic to pursue any human ambition without some *s a f e t y v a l v e s* inserted. Moreover, no *h o m o g e n i s a t i o n* is feasible without some re-heterogenisation at the same time. Paradoxically speaking, while modern formal legal development went in the direction that would mechanise the judge, it was also clear that law, with its irrevocably ethical colour, had always been too serious an undertaking simply to be left to logifying high-brows who would, as it were, process it with their impersonally formalistic apparatus. Therefore law has always built into the scheme, simultaneously with the very first act of *f o r m a l i s a t i o n*, the possibility of *d e - f o r m a l i s a t i o n* as well.

6. Within Given Cultural Bounds

Well, *l e g a l t e c h n i q u e* is in itself quite an omnipotent and universal instrument, which can be used by anyone for any purpose in any direction, on the one hand, yet, one that can only be operated in (and according to feasibility criteria set by) a given legal culture, on the other. Consequently, there is one given *l e g a l c u l t u r e* we are inevitably destined to build that will define the frames within which we can move at all, by offering us those paths in practice that will decide in the final account from what we may—by being encouraged to—conclude to what are the facts. As to its genuine root-components, legal culture is, in the final analysis, an incessantly re-actualised, progressing network of social conventions, within the womb of which certain skills, selected from among the huge variety of skills spread through the various civilisations, are utilised with a given intellectuality and according to a given ethos and a given goal-rationality. For instance, there is a logico-analytical culture—the cult of conceptual analysis, spread from Oxford, which has moved over from the field of philosophico-ethical investigations to law—in which our actions depend on one single formalistic consideration, in conclusion of some previously posited assumption, according to which even questions of whether I may express a feeling of sympathy or when I am authorised to kill my foetus or my mother,

and so on, will possibly be answerable with a dry logic. Nonetheless, I hope it is still thinkable that we, as sound souls and worthy of our human quality, do not wish to rely in our actions on the logic of abstract conceptual extrapolations as substitutes for individual moral responsibility. For so many issues were thought to be proven on paper as inferred from theories throughout history, yet in sober societies and communities we do not act expectedly as automatons, exactly because we think in a more complex way, trusting our numerous human faculties and the many talents bestowed on us. And with all this we presuppose, at least as a potentiality, that our underlying human culture may also develop the arsenal of further finely chiselled instruments.

In addition, in the final analysis it is also obvious that it is the same legal culture that has already produced the most strictly formulated rules to be applied on a mass scale, that has also made rights a function of the proper exercise of rights and categorised the fact of being actually dangerous to society as one of the criteria for a deed to be qualified as a crime. Hence, unlawful acts were not due to clauses themselves that were provided for in socialism, either. For it is the same ruthless dictatorship, which subordinated everything in every field, every way and under any circumstances to the political purposes of that central or local despotism (dominated basically by the personal intentions of individual party potentates), that also brutally totalised society. All things considered, it is exactly the use of so-called clauses as a legal technique that is accidental; but it is clearly inevitable on the level of social totality that where a homogenised sphere is built up a safety valve also has to be inserted in order to ensure social heterogeneity will prevail, even if most exceptionally, in the very last resort. Comparing societies and epochs, often a close parallel can be observed between a given legal culture and the use of some adequate culture of legal technicalities. Within this, it is, of course, tradition and the inherent urge to use skills already practised that may decide to which particular instruments of legal technique there will finally be recourse.

Almost this same duality (or jump in the opposite direction) manifests itself in the example referred to earlier, namely, in the Constitutional Court's

²¹ Unless we think of the constitutional description of the Republic of Hungary defined as a "democratic state under the rule of law" (Article 2/1), where the *definiendum* can only indicate cultural ethos rather than codified ways and conditions. See, e.g., for the nature and variety of understandings of the key term, Richard H. Fallon, Jr. '»The Rule of Law« as a Concept in Constitutional Discourse' *Columbia Law Review* 97 (1997) 1, pp. 1–56.

decisions on compensation and how to face the criminal past of socialism during the political transformation in Hungary. For there is no—and has never been—any express constitutional provision²¹ on the basis of which their adjudication would have not allowed a much more moderate decision or even an abstention from, or a decision concluding the opposite of, the extreme decisions that were actually made. Remarkably enough, the justices' official reasons were justified solely by sheer formalism. In so doing, they were drawing on the so-called "invisible constitution", that is, on one exclusively posited in their imaginations. However, on the expiration of their mandate—i.e., of the exclusively enforceable limit of their activity—, when they may have felt that the memory of their past activity and its assessment by posterity were already at stake, their subsequent attempt at justification proved rather material. This is what we call acting with *d o u b l e s t a n d a r d s*. And so it was also that when they declared they would henceforth adopt the jurisprudence of the Strasbourg European Court as a basis for decisions (of course, again, without any authorisation, i.e., purely through their own decision) our lawyerly community welcomed the news once "materially" and with enthusiastic applause, while at another time the same community only murmured that this was nothing but discretionary goal-rationality, that is, legally speaking, plain arbitrariness.²² At times,

²² I find it somewhat similarly frivolous to say now, for instance, that the Constitutional Court's activism in its first decade may have been appropriate to the conditions then but would be no longer timely if it continued similarly later on. For the Constitution has not changed meanwhile; consequently, the Constitutional Court's statutory mandate to adjudicate constitutionality has been the same from the beginning. And the mere fact that the Constitutional Court has no forum to be appealed against, as a result of which each of its actions procedurally has from the outset had the seal of constitutional force on it, has not entitled it to undertake any acts at will. That is, we also need to clarify theoretically if activism legally so unfounded by the wording of the Constitution (but at the same time having such far-reaching social consequences) is just one of the feasible materialisations of the free discretion that can be resorted to optionally or, rather, whether discretion fails to verge on abuse provided that it has not reached the extent of acting as legislative or even constituent power. Because the elimination of "unconstitutionality" can be exclusively understood by the test—or adjudication—of "constitutionality" in a literal sense, that is, according to the Constitution's provisions in force at its execution. When Lord ACTON summed up the experience of several millennia—saying that "power tends to corrupt and absolute power corrupts absolutely"—, he himself did not mean anything more than that law, especially regarding issues with a dramatic impact on the public, is by no means the automatic result of the possible lack of further formalistically posited delimitations.

therefore, it seems that we are enticed to adopt blind positivistic attitudes only to suddenly switch over to the charismatic contentment of self-liberation.

We might add that, at the same time, all this involves the availability of a strategic change of law as mediated by modifying either the context and/or the legal technique as well. Because whether or not this was consciously planned in advance in the Constitutional Court's considerations, eventually the path actually taken proven to be the strategically safest one, with an irreversible and irrevocable effect, as the Constitutional Court, by the same token, also accomplished the task of doctrinal conceptualisation when it formulated (in a sense in a rather sophisticated manner) the grounds for its decisions in question. For, as is well known, the "invisible constitution" (if this may signify a sensible term at all) indicates a conceptually elaborated system behind the Constitution's textual wording, a kind of dogmatics rendered constitutional force under the Constitutional Court's seal.²³ And it does so with an effect that, even if one or two decisions may be circumvented singularly in one way or another, surely a whole conceptually elaborated system cannot, because with such a step we would inevitably lose the guiding principle for any of our prospective interpretations.

For he was of the opinion that "Historic responsibility has to make up for the want of legal responsibility. Power tends to corrupt and absolute power corrupts absolutely. Great men are almost always bad men, even when they exercise influence and not authority: still more when you superadd the tendency or the certainty of corruption by authority. There is no worse heresy than that the office sanctifies the holder of it." Lord Acton's letter to Bishop Mandell Creighton on April 5, 1887, in his *Selected Writings in Essays in the Study and Writing History*, ed. J. Rufus Fears (Indianapolis: Liberty Classics 1986), p. 383.

²³ As the president's concurrent opinion to the decision 23 of 31 October, 1990 holds, "the starting point is the totality of the Constitution. The Constitutional Court has to continue determining in its interpretations the principled bases of the Constitution and the rights laid down thereby and establishing a coherent system by means of its judgments, which as an «invisible Constitution» serves as a standard benchmark of constitutionality above the Constitution which is nowadays being amended in everyday political interest". Cf. László Sólyom 'Introduction to the Decisions of the Constitutional Court of the Republic of Hungary' in *Constitutional Judiciary in a New Democracy* The Hungarian Constitutional Court, ed. László Sólyom & Georg Brunner (Ann Arbor: The University of Michigan Press 2000), pp. 41 et seq. Cf. also András Sajó 'Reading the Invisible Constitution: Judicial Review in Hungary' *Oxford Legal Studies* 15 (1995) 2, pp. 253–267 and K. Füzér 'The Invisible Constitution: The Construction of Constitutional Reality in Hungary' *International Journal of Sociology* 26 (1997) 4, pp. 48–65.

7. **KELSENian Re-interpretation: Law Getting Defined in Society**

If we claim that in the realm of classical positivism, law is a reified entity with a completely ready-made set-up and with boundaries for the outside world given from the outset, and this (along with the appropriate lawyerly culture and professional deontology) also involves the expectation that the law can be applied deductively as processed through our lawyerly logic and if, at the same time, in the guise of theory, now we also declare that all this is nothing but a mode of parlance until it becomes actually present and applicable for the jurist solely through an established meaning assigned to it—well, then we do not necessarily tell more than what Kelsen once did. For this tempting intellectual dead-end was foreseen by his philosophical reconstruction (with a tension induced by its internal contradiction) when, in the second half of his life, he concluded that in a legal sense, there is no “murder” (and, consequently, no “lawfulness”, no “constitutionality” and “unconstitutionality”, that is, no legal qualification whatever) in and of itself. There are nothing but *p r o c e d u r a l p o s i t i o n s* within the realm of law. And if, by the force of any of these, the judge now declares that you are a murderer or a woman, then it will be completely inconsequential in a legal sense what you actually did or what your gender is in reality. What will matter for law is exclusively the decision arrived at procedurally by the authority, which, once sealed by legal force, will from then on be utterly indisputable—as long as the given legal order prevails. Well, my above explanation relieves somewhat the austerity of normativity. That is, although in terms of this explanation reification in law is only an appearance in epistemology, as *e x c h a n g e s o f m e a n i n g s a n d a t t i t u d e s c o n - f o r m e d* to the latter are exclusively traceable in society ontologically; however, these still constitute a kind of continuum constantly moving and changing, shifted and re-shifted again in their tendencies with changing contexts, yet with elements built upon each other reliably; and thereby, they also will build into a kind of uninterrupted sequence of progress (irrespective of the fact that the law may suffer, as the case may be, no change in its objectified, textual form).

Expressed more simply, traditional legal positivism is a position against natural law, emphasising that there is a worldly identifiable maker of the law, as opposed to the classical natural law’s stand that traces validity back to a source transcending this law. In the light of such a duality, my point is on the borderland, as it doubtlessly (and perhaps also astonishingly) proclaims a kind of invisible democratisation. After all, although law has both a

particular maker and a definite circle of addressees in light of what has been said above, yet inevitably and incontestably we are all there in the work of law—that is, all of us in society, even if represented, for the most part, by jurists (justices and lawyers) who apply the law as a practical matter. I would even add that it was rather ironical for me to expound this only during socialism in Hungary, as such an allegation does recognize that there are limits even to despotism, for each and every addressee of the law actually takes part in one way or another in the processes of giving meanings to law and thereby making it—again, in one way or another—re-conventionalised.

Nevertheless, our established culture of developing meanings in law may derive itself only from norms authoritatively issued. And this necessarily embodies the ontic process, sociologically describable as a fact, in terms of which society as a circle of addressees conventionalises it while acquiring it. The question arises whether this can be anything other or more than a kind of Kelsen-reinterpretation. Well, although Kelsen's aim might have been quite the opposite,²⁴ by the further elaboration of his *Pure Theory of Law* he actually relativised all the law's components, thrusting us back into a kind of uncertainty and sheer accidentality, because he built up, with endless austerity, a pyramid-like theory of gradation [*Stufenbau*], offering a logified picture of the structure and operation of the whole set-up of law with inexorable consistency, excluding any contingency, on the one hand.²⁵ However, with the American publication in 1946 of the re-formulation of his work²⁶—in which he elevated the moment of the legal force into a criterion set—, he rendered all this relative, on the other. This way it has become clear that within the field of discretion in which such a simultaneous

²⁴ Because—as István Losonczy himself once noted it—, according to the law's “dogmas” [*A mulasztás I: A mulasztási bűncelekmények okozatossága* {The default, I: The causality of crimes of default} (Pécs: Dunántúl Pécsi Egyetemi Könyvkiadó és Nyomda R.-T. 1937) viii + 240 pp. on p. 70], Kelsen built up “the doctrine of legal forms” [*A funkcionális fogalomalkotás lehetősége a jogtudományban* {The availability of functional concept formation in jurisprudence} (Budapest: Királyi Magyar Egyetemi Nyomda 1941) 142 pp. at p. 90], wherein he used the concept as “a law of sequence building”, as a “sequence of functions propounded within a definite law” [*ibid.*, pp. 25 & 81, meaning by ‘law’ here the regularity established by sciences], albeit the “syncreteness of [legal] law is nothing but [...] the result of the particularity of such [scientific] laws that constitute the [legal] law” [*A mulasztás*, p. 73].

²⁵ Hans Kelsen *Reine Rechtslehre* (Leipzig & Wien: F. Deuticke 1934) xiv + 236 pp.

²⁶ Hans Kelsen *General Theory of Law and State* (Cambridge, Mass.: Harvard University Press 1945) xxxiii + 516 pp. [20th Century Legal Philosophy Series I].

application and making of the law takes place, in fact everything and also its opposite may occur. This is all the more so because the very question of what is application—i.e., what can be regarded, from a normatively higher level in hierarchy, as pre-defined for the lower level?—can only be answered from a procedural position entitled to official reconsideration or revision (as anything else can only be taken as a private opinion), and thus, any optional element or consideration, even if outside the law, may, if it becomes legally final by the seal of a *res iudicata*, become incorporated forever into the law, despite its eventually random contents. Well, in the final account, it seems as if KELSEN's entire oeuvre accentuated nothing but this: although the law has a logifiedly solid framework, built up laboriously and at the cost of great efforts, yet if anyone really wanted to take it into his hands, the structure would suddenly crash and just slip away like grains of sand.

In the spirit of the above, we usually say that, all things considered, law *d e f i n e s i t s e l f*. However, this, examined more closely, may turn out to be misleading, because we can only speak of its (being incessantly in the course of) becoming *d e f i n e d*. For this is a process of self-generation in which a normative factor is given, with reference to which we may attempt to define its meaning for ourselves (in our positions as judges, attorneys, lawyers, etc.); at the same time, our version of meaning is confronted with that of others, which communication of meanings eventually adds up to continuous re-conventionalisation. This understanding of the law is, in the final analysis, nothing but a social—institutional—*p r a x i s* theory. It suggests that the ultimate certainty, the source from which KELSEN would have started out to try to reconstruct intellectually the world of law with its structure and operation out of some elementary stones as experienced, is ultimately nothing other than we ourselves.

8. A Closed/Open Systemic Response

As a matter of fact, it was at the end of his life that KELSEN actually could arrive at what could already serve, from my point of view, as a starting point. That is, when he introduced as explanatory principles the moments of both legal force and efficacy (i.e., the factual acceptance of something that is exclusively an order by and large already being enforced, and which has a validity we may speak sensibly about at all), he actually had already *c o n c l u d e d b a c k w a r d s f r o m a s o c i a l e n d - r e s u l t* as a total result, and obtained by reduction that which he can now use to build

up the law. So, from the moment I started re-considering Kelsen's theory of law-application,²⁷ I could recognise only this path as acceptable.

Accordingly, the closed-open system that characterises the relationship between what is inside and what is outside the law (with the movement inside the law) is itself nothing other than a continuum, displaying features of a particular autonomy only from an analytic point of view. We can define its foundation, outlines and contents basically only from the facts of practice from the last empirical *donné* ['what is given', as once formulated by GÉNY] that we can reconstruct at all. It is in this that the sense of excluding the availability of normative logical conclusions from law lies, as thereby we resolve all this in a feasible reconstruction from actual practice. For practice testifies to both continuity and reliability. For jurisprudence as the living practice of law, characteristic of a country or of an epoch, can certainly be by and large described as a sequence of consecutive steps in harmonisation with and conformity to each other in the light of later reconstruction.²⁸

If we asked again whether law defines itself and whether this is true in all respects both inside and outside the law, we might perhaps respond to the above by referring to the ideal picture of three intertwining circles.²⁹ According to this, there is a constant movement going on objectively in the total societal work of shaping the law. The components taking part in this movement, pressing against each other, are (1) the legally relevant attitudes in society, (2) the actual judicial decision-making practice, as well as (3) the posited law (with the law's doctrinal aspiration to define itself in *Rechtsdogmatik*). In the incessant whirl of the subsequent actions by the various actors in (1) social action, (2) legal action, and (3) the law, we can be assured of one circumstance at least: in the end, we can always describe—at least in hindsight—which of them will prevail (if at all) in their struggle. In addition and in the last analysis, one of them may become predominant ir-

²⁷ By the author, 'Hans Kelsens Rechtsanwendungslehre: Entwicklung, Mehrdeutigkeiten, offene Probleme, Perspektiven' *Archiv für Rechts- und Sozialphilosophie* LXXVI (1990) 3, pp. 348–366 & 'Kelsen's Theory of Law-application: Evolution, Ambiguities, Open Questions' *Acta Juridica Hungarica* 36 (1994) 1–2, pp. 3–27.

²⁸ That is, with a given—subsequently certainly reconstructible—failure rate, the extent and pretensions of which are of course again indicative of the quality of the legal culture in question.

²⁹ First applied by the paper in note 3, as well as, also by the author, *Lectures on the Paradigms of Legal Thinking* (Budapest: Akadémiai Kiadó 1999) 279 pp. [*Philosophiae Iuris*], especially in para 6.1 on pp. 203 et seq.

respective of which specific legal doctrine is being enforced in the given society at a given time. That is, the process of their being pressed against one another with one of them becoming (relatively or absolutely) predominant is bound to take place anyway. And our repeated statement on that law eventually defines itself and, in this *self-determination* to become *defined* in the given situation, only the given (and not another) status (or qualification in and by the law) could arise as a result of the process, which becomes understandable in this context.

The final conclusion, too, can be derived from the above statement, namely that integration (thereby ensuring unification within the European Union or elsewhere) will not be effectuated in terms of cultures but in terms of rules and instruments—if such a process will proceed at all. And this is not a pious wishful agenda of legal policy but a value-free statement on probabilities based on the foregoing. Just as I cannot grasp law as such, only its meaning(s) as asserted in practice, in the same way we cannot do anything with legal culture based on our wishes (e.g., by shaping or integrating it with something else), because, as we have seen, legal culture, too, can manifest itself in nothing but continuous givings of meaning, that is, in the actuality and succession of conventionalised meanings. Consequently, all we can integrate through human intervention (and through politics by deploying artificial instruments) is nothing other than the kinds of objectivation that we may have symbolically erected, for want of better means—for example, texts with their direct logical consequences involved.

LAW, UNDERSTANDING OF LAW, APPLICATION OF LAW (A Summary of Developments in Thirty-six Paragraphs)*

I. CLASSICAL HERITAGE [287] 1. Continental Law [287] 2. Anglo-Saxon Law [291] II. REALITY IN OUR APPROACH TO LAW [293] 1. As Professional Deontology [293] 2. In its Theoretical Explanation [294] III. THE COMPLEXITY OF OUR LEGAL WORLD CONCEPT [301] 1. The Complexity of Civil Law Mentality [301] 2. The Complexity of Common Law Mentality [301] IV. WITH HUMANS IN THE LEGAL MACHINERY [302]

I. CLASSICAL HERITAGE

1. The rich legal heritage of the Romans, with its changing internal emphases, assured a basis for the development of two differing traditions during the European Middle Ages and Modern Times. In the course of this formative process, starting in the 16th and 17th centuries the approaches to law characteristic of our Continent and of the Anglo-Saxon archipelago were gradually separated as they were strengthened by the failure of attempts to codify the law in England.¹

1. Continental Law

2. As soon as this separation has been perfected, in continental law nothing remains from the *ius* except that which has been posited as a *lex*. In terms of this transformation process, the *regola*—once serving as a didactic exercise and summation—becomes the sole bearer of any legal quality as a set of linguistic signs that is destined to embody the law.

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¹ Cf., by the author, *Codification as a Socio-historical Phenomenon* (Budapest: Akadémiai Kiadó 1991) viii + 391 pp.

From that time on, anyone who is eager to know what the law is (in terms of its sense, message or significance) must turn to its embodiment in and by rules.

3. By this act and starting from the Roman imperial epoch, such a form becomes the exclusive source of any contents hidden in and by it. Of course, this form may easily prove to be casual, random and/or fallible; nevertheless, nothing else can be taken as law other than precisely that which has been edicted. This form is no longer an external gown veiling the legislator's idea but the sole embodiment. With such a solution principally strengthened (but still as a correction mechanism building around the original idea), it will be accepted only later that whatever interpretation of the law's provisions may nevertheless draw from the law-maker's intent—as an auxiliary source (that is, among other additional sources)—anything that can be read from (a) the conditions understood by the legislator, (b) the whole texture of regulation, (c) the actual knowledge as to the historical circumstances of legislation or (d) the intentions expressed during the bureaucratic procedure of legislation.

4. Law is, therefore, a text with a meaning that can be ascertained through textual analysis, that is, by the help of linguistic and logical devices used to look for connections and their disclosure. As interpretation theories would also formulate it, in case of necessity the interpreter might also have recourse to a search for proper meaning through the law's context as drawn from either (a) the intent of the legislator or (b) the historical conditions or (c) the systematic setting of the given piece of legislation.

5. The very fact that the law is embodied by enacted texts and, therefore, it is treated textually in practice makes it possible for jurisprudential interpretation to forge concepts out of mere words used in the legal texture, in the course of classifications. It is no longer simple words but conceptualisations that stand for—as a representation of—diverse aspects of reality, conceptualisations that are developed into a complex and hierarchically organised notional system, which is defined in its components' mutual relations by boundaries with edged contours. These concepts are positioned as loci of a taxonomic systemicity, erected in place of mere words.

6. Such conceptuality is, however, not imbued directly by the law's texture itself; the words used in the *gesetztes Recht* do not simply contain it. For *legis latio* is a practical act throughout. It is the volitional product of the agent authorised to issue normative texts. This is the mere result of some *volitio*: contingent in principle, plainly arbitrary in a philosophical sense, since, optionally, it could be something else as well.

7. What pulls law as such to the conceptual world is the jurists' conceptual analysis: classification and system-building, through which the jurisprudential reasoning over the internal connections of the law-stuff will create concepts by drawing analogies amongst individual words or by breaking down and/or splitting already established concepts into others. As an obvious denominational analogy—supported by the memory of the strict conceptuality disassembled from Biblical texts—this is what we call *Rechtsdogmatik*. Such a doctrine is the production of legal scholars having analysed law texts with the intent of forging an internal systemic connection in view of reaching *this* available perfect conceptual systemic network from *that* resource of processing. Once established—and only provided that such a demand for conceptual systemic building is grounded on the common ethos of the given legal profession (not as an unnoticed pioneering attempt but expressing the mainstream of the age as, for instance, in LEIBNIZ' epoch)—, such a doctrinal net (with the actual shape it has acquired) will form a web of understanding around the law, i.e., a weakly (though informal) normative environment that already serves as a kind of pre-understanding [*Vorverständnis*] for all kinds of juristic activity when those professionals (making, applying or just studying law) start dealing with normative or other legal texts.

Accordingly, and as a point of principle, legal texts themselves have ever been and will remain incidental and fallible. Their human understanding in this very culture (with the law already taken at a conceptual meta-level) will become imbued with such a doctrinal knowledge, slowly to be entirely presupposed by it.

(This is why in such cultures law, legal practice and their doctrinal representation may stand as relatively separate but mutually preconditioned and interactive entities, albeit in the social division of labour specialists are accustomed to cultivate one or the other as their specific fields.)

8. As soon as the legal text is seen as ordered by conceptual limitations and additional adjustments (e.g., by making exceptions through further internal splitting)—with any element or partial field treated as the product of

the b r e a k d o w n of the overall total regulation, considered (in given time segments) as a closed unit, logically coherent and settled in details—well, then whatever idea we can form about law will from the outset be marked by a systemic place or *locus*, the basic features and definitions of which will already derive from its systemic definition.

9. As a pattern of thought, thereby, the *mos geometricus* is given a shape. This is a concept deriving from the movement characteristic of the 16th century, when the European continental manner of studying law was set for centuries, that is, a methodological ideal that laid the constant foundation of our approach to law, prevalent even now. Beginning from classical times in Bologna, this idea permeated the reception of Roman law all over Latinic and Germanic Europe; despite all kinds of shaking, rectification, challenge and enrichment with new trends, this is the model that grants commonality in our respective understanding of law, while defining our identity and membership in one definite legal culture.

Within this intellectuality, the cultivation of law is seen in the composition of a series of operations similar to those in mathematics, upon the basis of which the ideal has ever been to build up a perfect system both closed and exclusive, which, if challenged, can only be replaced by another, completely new in principle, according to EUCLID's axiomatism.

10. The ideal of law represented by such an idea of normative systemicity will at the same time produce its pair and completion reflected in the world of factual reality, referenced in and by the law. This is the *Tatbestand*—taken as the aggregate of those facts that constitute a case in law—, which can only be thought of within the frame of a doctrinally organised approach to law (as a representation of *Sein* in counterpart to *Sollen*, with the former featuring the marks qualified by the latter). The notion of *Tatbestand* is a product of the mid-19th century continental culture, of the idea that legal scholarship reduced to *Begriffsjurisprudenz* [conceptual jurisprudence]—while approaching law-related (law-referenced) factual reality in a conceptual way—can be developed. It is not by chance that the term *Tatbestand* has no proper equivalent in English, where—without any polarisation between *Rechtssetzung* [law-making] and *Rechtsanwendung* [law-applying], *administration of justice* is practiced (instead of the law's 'application')²—

² Cf. Peter G. Sack 'Law & Custom: Reflections on the Relations between English Law and the English Language' *Rechtstheorie* 18 (1987) 4, pp. 421–436.

it can only be circumscribed (as translated from MAX WEBER, for instance) by “operative facts”, “actual circumstances” or “facts that constitute a case in law”.

11. Well, according to its theoretical model, law - application projects the world of norms onto that of facts, ascribing the former’s normative requirements to the latter. Or, what is modelled here is the set of reality aspects of those actual events, actions and situations that, matched separately one by one, will in their entirety add to define a particular *Tatbestand*, taken as a case of the rule, representing those reality aspects defined through the abstract formulations of a rule, to which the rule ascribes some legal conclusion (or sanction).

12. This model is based on logical inclusion. What is at stake here is a particular actualisation on the plane of individuality, of what the norm has defined on the plane of generality. Starting from the norm, this will ground the logical necessity of judicial syllogism [*subsumptio*] that will lead to the judgment, based on the given norm, concluded from its generality. (For instance, providing the norm sanctions humans killing humans, and our case is about homicide, then the sanction imputed to anyone having performed the deed must be meted out.)³

2. Anglo-Saxon Law

13. The Anglo-Saxon mentality has adapted quite a differing pattern of legal regulation and judicial settlement of conflicts from the same Roman legacy. It continued its patterner’s earlier attempts towards methodicalness, not departing too much further from the ancient Jewish and Islamic traditions.

It did not look for safety in either conceptualising generalisation or the systemicity it had achieved; it did not dedicate its exclusive trust to the force of central edicts, believed to be suitable to settle everything. It was satisfied to build up law through examples following other examples, progressing casually by concrete situations answered by justices, who drew their pattern from their comparisons with earlier patterns, with the final outcome

³ Cf., in first formulation, by the author, ‘Moderne Staatlichkeit und modernes formales Rechts’ *Acta Juridica Academiae Scientiarum Hungaricae* 26 (1984) 1–2, pp. 235–241.

being that the judges themselves, proceeding in individual cases, could become the agents to declare what the legal tradition (reflected in their case) had always been. In order to master the very process of such a continual actualisation of the law, discipline and rational safety had to be assured to the extent feasible. This way, the Anglo-Saxon law's casual and inductive processing and its respect for the unique in the genuine representation of the fullness of life (and, thereby, also its openness towards any novelty in a given situation) could preserve a bit of sensitivity toward practical reason and daily moral deliberations, notwithstanding the fact that it could also successfully separate itself from the heterogeneity of everyday life through the *artificiall reason* it erected. On the one hand, in the case of adjudication it alleges it has based its judgment on *un stated rules* but, on the other, it refrains from declaring what *regolas* have indeed been serving it. In consequence, almost until today it has not cultivated the kind of doctrinal culture that may build on general abstract norms exclusively.

The Anglo-Saxon law cannot be taken as thoroughly conceptualised into an overall taxonomic system, independent of whether an enormous amount of rationalising literature has for centuries edified rather considerable meta-intellectuality above it. Instead of employing conceptual systemic consistency and completeness to build a replacement of the given chaotic accumulation, this literature responds mostly to practical challenges in terms of functionality and practicality.⁴

⁴ Cf., by the author, 'Differing Mentalities of Civil Law and Common Law? The Issue of Logic in Law' *Acta Juridica Hungarica* 48 (2007) 4, pp. 401–410 {& <<http://akademaii.om.hu/content/b0m8x67227572219/fulltext.pdf>>, abridged as 'Rule and/or Norm, or the Conceptualisability and Logifiability of Law' in *Effizienz von e-Lösungen in Staat und Gesellschaft Aktuelle Fragen der Rechtsinformatik* (Tagungsband der 8. Internationalen Rechtsinformatik Symposions, IRIS 2005) hrsg. Erich Schweighofer, Doris Liebwald, Silvia Angeneder & Thomas Menzel (Stuttgart, München, Hannover, Berlin, Weimar, Dresden: Richard Boorberg Verlag 2005), pp. 58–65}, as well as 'Law and its Doctrinal Study (On Legal Dogmatics)' *Acta Juridica Hungarica* 49 (2008) 3, pp. 253–274 {& <<http://akademaii.om.hu/content/g352w44h21258427/fulltext.pdf>>} and 'Legal Traditions? In Search for Families and Cultures of Law' in *Legal Theory / Teoría del derecho Legal Positivism and Conceptual Analysis / Postivismo jurídico y análisis conceptual: Proceedings of the 22nd IVR World Congress Granada 2005, I*, ed. José Juan Moreso (Stuttgart: Steiner 2007), pp. 181–193 [ARSP Beiheft 106] {& [as a national report presented at the World Congress of the *Académie internationale de Droit comparé*] in <<http://www2.law.uu.nl/priv/AIDC/PDF%20files/IA/IA%20-%20Hungary.pdf>> & *Acta Juridica Hungarica* 46 (2005) 3–4, pp. 177–197 & <<http://www.akademaii.com/content/f4q29175h017r11/fulltext.pdf>>}.

II. REALITY IN OUR APPROACH TO LAW

14. The question arises whether or not our view formed on law in Civil Law cultures comports with institutional reality. The answer can only be ambivalent, that is, duplicate as formulated at different levels.

1. As Professional Deontology

15. Our previous characterisation is true in a descriptive sense in so far as it gives an account of the ideal pattern of our legal thought. For ideology as a kind of professional deontology, a manner of thinking specific to the legal profession, and in this sense a *juristische Weltanschauung*, has been and continues to be undoubtedly present in the approach to law rooted in our continental culture. In the above sense as well, ideology is consciousness that exerts impacts onto practice; consequently, it is a decisive component of the social ontological description of humans in action. This is part of a culture that assigns frames, within the boundaries of which we appropriate the world intellectually. Within them, we form key categories for understanding the world, while we also sense and/or attribute definite value-contexts of/to the same world. In its turn, *juristische Weltanschauung* is the foundation stone of legal cultures that shapes human abilities (skills and sensitivities) by which we may sense law at all and search for paths and spheres of action with reference to it. As a consequence, independent of its epistemological status (namely, of the issue of whether or not our specific law does indeed function this way, under its conditions and fulfilling its criteria), the lawyers' professional deontology is part of the genuine ontology of legal arrangements. Accordingly, it is part of the operation we can describe starting from the accumulated experience of (a) human practice making use of law, (b) the overall societal *praxis* and (c) *jurisprudencia* as the total sum of legal *praxis*.⁵

⁵ Cf., by the author, *The Place of Law in Lukács' World Concept* (Budapest: Akadémiai Kiadó 1985 [reprint 1998]) 193 pp.

2. In its Theoretical Explanation

16. At the same time, theoretical reconstruction raises reasonable questions as to what indeed the existence of law does consist of, what are the consequences of its being carried by a linguistic medium, what are the chances of humans as socially exclusive acting agents and, at last but not least, in what exactly does their responsibility lie? Therefore, the inquiry goes on further: are we perhaps ourselves passive observers (perhaps mere reference points) in a structure operating like clockwork (possibly without our personal presence as well), since the law works as thoroughly logified within its pure formalism in a quasi-automatic way, broken down into a homogenised network that is empowered to produce its output, and which can reproduce itself continually—on the basis of its own presuppositions as equipped with its own laws and consequences, built in by some next-to-mechanical safety? The answer can only be formulated in terms of the suitability of human practice for self-reproduction through its own traditions as characterised by today's social theories, on the one hand, and of the irrevocable human responsibility as cultivated by the known theologies of morals, on the other.

17. Well, the ideological stand implied by our *juristische Weltanschauung* approaches both language and law as if they were simple objects of the world's reality; as if it was going to suggest exactly what metaphysically inspired logic wanted to inspire actual belief in (particularly in Germanic philosophies⁶)—namely, that relations (of logic and dialectic especially) are hidden in, or implied by, things and objects (their moves, coincidences or configurations) themselves. Nonetheless, it is exclusively statements that we can make as to objects and as to whatever kind of virtuality, that is, practically as to anything that can be specified by human ingenuity in the course of our mental appropriation of any imaginable world (involving the Golden Fleece or a unicorn, or hypothesising such limiting units of reference as the absolute cold or the arithmetic zero point, or abstracting the philosophical conclusion of „*Das Nicht nichtet*“, as developed by MARTIN HEIDEGGER⁷). If

⁶ See, e.g., the discussion on the ontology of nature between EUGEN DÜHRING and FRIEDRICH ENGELS.

⁷ What has already been (reminding this above form of “*The nothing noths*”) raised as a problem in English–American analytics (by RUDOLF CARNAP, JOHN AUSTIN, etc.) as well.

and insofar as we treat such statements within one single coherently comprehensive perspective, then once the truth/falsity of any of them, grounding our argumentation, is acknowledged, we may deduce true/false conclusions from them.

18. At the same time, law is thoroughly *disantropomorphised*, and it is we who have done this. By abstracting from our subject's substance and genuine nature (dependent directly on human volition, practice, consideration or pure interest), we are used to investing our trust (which we have not undertaken, because it is not relegated to our rational common sense) in something else—notably, in some virtually reified entity or safety, projected from ourselves into a kind of substitute authority. Accordingly, we began to treat law as a reified construction alienated from ourselves, as if it could operate without us, like the Delphi oracle or a God-judgment set in motion as a specific slot-machine to settle our case, into which (as we are made to believe under the constraints of our professional socialisation) we might feed the parameters of the given case so that it would then dispense from its “black box” the single conclusive decision.

19. As to the device of our communication, we have to be aware of the fact that law as *linguistic practice* also can only be intelligible for those who are skilled enough to use it properly. The case is by no means one of mute signs that catch or address us. It is we who make the language sounded in sending and receiving *signs as markers*. Of course, we do not act as isolated Robinsons. We are equipped with general societal (and added professional) education, socialisation and practice of common understanding. This is strengthened by daily use, suitable to re-conventionalise language practice. Thereby, we actualise the language that may make both our procedures and life in society liveable and reasonable.

20. Language is certainly not exact, on the one hand. This continues to be so notwithstanding the fact that, as the most available mediator in societal contact and commerce, only such an ambivalent medium can fulfil language's ontological role, on the other hand. Moreover, not even in principle could language be reduced into a less unambiguous mediator or conveyor of meanings. At the most, we may try to be more precise in our handling and resolution (dedicated to given relationships or limiting issues, when we draw limits or weigh individual situations), by asserting in a socially valid way what we want to express then and there. When we proceed by

defining an actualised meaning (instead of the physical act or linguistic symbolism pointing directly at what we actually mean), a step forward is taken indeed, but without ameliorating *the* language itself, its state of being fuzzy from the beginning. Our innovation or rectification generated at one moment will inevitably become like mist when problematising at another moment and this goes on infinitely. For the next moment we have language as it has ever been: silent—and defective in counselling. This is to say that the next moment is faced with a new situation, with novel expectations toward language, or mediation through language.

21. That which may catch and bind us in fact is neither language nor law expressed lingually, but our *c o n v e n t i o n a l i t y*. In societal cooperation we do rely on law, among other things. We call upon it, refer to and interpret it, trying to settle affairs according to patterns it has forwarded. For law offers orientation in settling disputable practical issues. It offers guidance and proposes a normative model. It serves us by being wedged *a m o n g s t u s*, separating the partners in dispute, by being *i n d e p e n d e n t* of each of us and disposing of relative *c o n s i s t e n c y*. For it is suitable for mediation by offering a *p a t t e r n* to our action. That is, it can model dispute resolution so that the outcome will be not of mine or yours but that foreseen with respect to all such (essentially or substantially similar) situations, cognoscible by anyone in advance. So, what will be concluded will have already been patterned.

22. It is facts that surround us in nature and social life. These are mostly facts simple and unmediated, “brute” and formless. What we are faced with in the law’s *Tatbestand* are already *i n s t i t u t i o n a l* facts. For law is not to be found in our affairs themselves. We identify it mostly *o u t s i d e o f* and *a b o v e*, and *s u b s e q u e n t* to, the elementary formative components of our affairs, at a time when we, reinterpreting them in the law’s normative context, try to project the law’s structured messages onto a factual or hypothetical case. Life is going on incessantly, following heterogeneous tracks. And the law is—allegorically speaking—withdrawn like a spider, expecting now and then to strike at any of its selected aspects. Once that happens, the law will assimilate this whole life event (by denaturing the latter’s heterogeneous full complexity) to the former’s homogenised—simplified—norming [*Normierung*]. Literally expressed, no one can any longer identify what the law has made out of it, and perhaps not those who are targeted by it; since one given *Tatbestand* (predefined by the law) will have been

distilled from its primitively unique full-of-life richness. And this is so because the *Tatbestand* cannot be anything other than the factual reflection of the corresponding normative ruling. The only features that can be included as imputed to the humans in question (to their casual drama or luck, taken as a personal, non-recurrently individual event) are those which have already been specified as *r e l e v a n t* in the abstract regulation.

23. All this is as if artificially erected nightmarish shades were looking for opportunities, with projective nets, in the density of life, with the aim of picking suitable relevance-sets from it. That is, an *e x t e r n a l l o g i c* is projected upon *a c t s i n l i f e*, according to different available considerations—for instance, to impute to a flighty irascibility (attributed, e.g., to O. J. SIMPSON⁸) homicide, adultery, personal injury, perhaps breach of contract, or even failure to meet his obligations for maintenance, out of the caldron of the legal witches' kitchen. This is to say that as long as we have not decided at all *what* of this or that qualifies *as having occurred* according to the law, we may only ponder in silence. However, as soon as that is decided, we start banging on every gate: this is *that*, and only *that*, moreover, a master case of *that*—as if *that* had been invented from the beginning and only to sanction our client's case.

Our game could appear to be funny as well if it were not both serious and indispensable. This structured and more-or-less homogenised thought is applied in all fields of socialisation and societal transmission, that is, within the bounds of our humanly created *s e c o n d n a t u r e*. As a consequence, life itself will be arranged following such a logic, destitute of the values and intimacy of the heterogeneity of everyday life but equipped with the force of social ordering and engineering, and, therefore, desired as the *sine qua non* of civilised human existence. For the sake of generating law and order for ourselves, we raise fixed points that are extrapolated and alienated from ourselves as the standards addressing us.

24. I may happen to carry only a potato to you. However, I cannot know in advance whether and when my or your lawyer will call it delivery, agency or necessity, supply or disturbance of possession, perhaps theft, or something else. In any case, the internal (primitive) logic of my action (with its process-like development and gradualness) may well differ considerably from that which will be ascribed to me in law. This is so because the action

⁸ Cf. <http://en.wikipedia.org/wiki/O._J._Simpson_murder_case>.

in question may have followed its own path alongside its *ad hoc* “logic” (chaotic in itself as having been formed from one moment to the next), with open alternatives in every movement forward here and there. And all this notwithstanding, the juridically constructed *Tastbestand* will reconstruct a cumulative development out of this, as a one-way process that may have pursued one preset end with features that involve nothing more than those facts that may make a case in law. And what is more, the way I shall be judged will be seen as the outcome of cognition, as if I were tracked all the way through by the knowledge of a neutral outsider—instead of treating me as the subject to whom the normative consequence of a system of norms is meted out.

25. The declared result of normative imputation is *a s c r i p t i v e*. It will conclude some normative consequences of my action by the force of someone’s volitive act and discretion. The legal status as to which my action is being qualified or classified will be defined with the above intention of imposing those consequences, and not as issuing from mere cognition. The whole process is not cognition as a result of someone having (with a magnifier) searched in the law or examined the collective memory of my action in order to identify exactly what (and how) may have met in the two (normative and factual) components. In fact, my judge has tested variations to couple them—according to additional considerations such as the prevailing interests and, maybe, intuitive sym/anti-pathy towards me. By the very fact of having qualified the event as the case of the given legal category, my case has already been decided. This legal category being an institutional fact itself, it is not cognition but exclusively a *v o l i t i o n a l c l a s s i f i c a t i o n* that will classify my action as a case of the law. In law, nothing is described: we only classify actual life situations here and there. Instead of cognising, we decide—with as much rationally as we can, and based on evidence as much as we can. Therefore, instead of converting the action into anything of logical necessity (that is, into subsumption or a logically obvious conclusion), we *s u b o r d i n a t e* it to something else with the justices’ volitional act’s force.

26. Let us pay attention to the change in emphasis here, from the logical model establishing necessary connections amongst our things in an impersonal way, to the social ontological nature of what in fact is stricken out and produced by our social action of fore-planning, since all the connected

steps are of such a type here that could have not ensued without their actual performance. Our human involvement is, therefore, creative and strictly *c o n s t i t u t i v e*, irreplaceably effectuating something. In other words, it is *a r b i t r a r y* in the sense of logical necessity, even if not otherwise senseless, indefensible or irrational. This is to say that it is mostly *p r a c t i c a l p r o b l e m - s o l v i n g* that we are engaged in, whilst the motivation for our verdict—its *j u s t i f i c a t i o n*—will prove, from the texture of the law, to be the compelling *d e m a n d*, that is, the necessity (even in details) of such—and only such—a solution.

27. All this takes the form of a *d e c i s i o n*. For the given solution never could be completed in another way without artificially *c u t t i n g o f f* all the further (and otherwise feasible) paths and ways of the endless series of doubts, including the temptation to consider crossroads with alternative solutions. Until we have manipulated (interpreted and arranged) the facts to an adequate depth, not even their legal classification is finalised. Nevertheless, disputing what *this* was, actually how *this* happened and what grounds we have for qualifying *this* as the case of *that*, can only be cut as a Gordian knot. This is equal to saying that our *c e r t a i n t y* is by no means absolute; therefore, the certainty concerned will be termed as “judicial” (i.e., *a r t i f i c i a l*), “rational” (i.e., *l i m i t e d*) and/or “procedural” (i.e., with exclusive *v a l i d i t y f o r t h e j u d g e m e n t*) at most.⁹

⁹ We should consider how much we are used to ignore, when approaching law-application in a purely juristic manner (breaking it down into a syllogistic form), its fallible and contingent nature only justifiable through the long-term reliability of human *praxis* in the last resort (which reproduces itself incessantly) in general, and the underlying character of the *q u a l i f i c a t i o n o f f a c t s*—for the story itself is to be reconstructed from the witnesses’ narrations expressed in different object-languages, which has to be transformed (transcribed) into a fact in the law, that is, “qualified” as the case, or subordinated to be a case, of an abstract definition (and of the gaining of *j u d i c i a l c e r t a i n t y*) with compiling the story in the course of evidence anyhow: from bare fragments, probability conclusions at different levels that may result mostly from additional circumstances, all them serving as the sufficient base to declare categorically sometime that *that* happened in fact—in particular. For all these components with their most elementary constituents are creative with a constructive force, irreducible to formal certainty in a scientific sense, and as such, unsuitable to total rational reconstruction; the fact notwithstanding that these are the most substantive moments—serving as the turning points [*Eckdaten*]*—of each and every judgement in justice.*

Methodologically speaking, it could only be compared to *t h e o l o g y* in explanation of the transcendence of human life, which, since the age of Saint THOMAS AQUINAS, was explicated in masses of volumes of great systemic corpuses, expressed in incessant discussions (in lines

28. This is why adjudication is eventually finalised with *l e g a l f o r c e*. Whatever decision is reached, it cannot tempt any longer. It must be finally accomplished, placed in the archives' oblivion, as a past instance of accomplishment of the then-prevalent law and order.

29. Musing on the ordering role of law in society, we may ponder on how many thousands of thousandths of our daily transactions are selected in order to provoke law-sensitive deliberation at all, how many thousandths of them are made controversial in order to await judicial deliberation. A great volume, the overwhelming majority, of both deviances and actions that are hardly defensible in law will remain free from legal reaction. What percentage of the other part will gain final force without any appeal against its first adjudication? Perhaps this will be a majority of the cases whose juridical solution would presumably never reach reconfirmation in legal reconsideration, while convenience, triviality or other petty conditions may have been in play in promoting their first conclusion with legal force.^{10;11}

of competing directions) for centuries. Behind the whole undertaking, however, it is the humanity's fullness of being—their total existential and practical consideration and decision, their extraordinary complex (psychological and other) attitude—that stands, which, in their finite life and personal options, express an act of volition that, beyond a certain limit, cannot be stressed further by the mere means of *ratio*. This is the moment of *credo* (specified as the realisation of *credo quia absurdum*). Such realisation will be socialised by us as a *Ding für uns*, as something given to us, that we have to develop in our earthly life by the intervention of *f a i t h*, that is, by recognising our created nature with the whole chain of ensuing conclusions. Once this recognition is achieved as wedged in our socialisation, every component of the reconstructions from such theologies (with their mission's vocation) turns at once to be intelligible for us, raising the awareness of its conclusions as well. But when this is missing, in the given field—and in regards of the actor in question—the object itself (together with the complex net of relevancies) will be lost: it will cancel itself out of their well-developed potential.

¹⁰ Cf., by the author, *Theory of the Judicial Process* The Establishment of Facts (Budapest: Akadémiai Kiadó 1995) vii + 249 pp. and *Lectures on the Paradigms of Legal Thinking* (Budapest: Akadémiai Kiadó 1999) vii + 279 pp. [Philosophiae Iuris].

¹¹ The historical explanation by Martin Shapiro 'Islam and Appeal' *California Law Review* 68 (1980) 2, pp. 350–381—[reprint in *Comparative Legal Cultures* ed. Csaba Varga (Aldershot, Hong Kong, Singapore, Sydney: Dartmouth & New York: The New York University Press 1992) xxiv + 614 pp. [The International Library of Essays in Law & Legal Theory, Legal Cultures 1], pp. 299–330—is inspired by such recognition. According to it, the state power that controls the course of "law and order" implementation has to tolerate—up to a certain level, grade and depth, having in view the practical considerations of practical operationability—the variety of jurisprudence effected in the name of law (with the competition of divergences involved), as inseparable from the total function. However, as a practical test of the legally rele-

III. THE COMPLEXITY OF THE LAWYERS' WORLD CONCEPT

30. The unification in institutional operation of conceptual patterning, on the one hand, with linguistic formulations, on the other, presumes complex constructions, together with the formation of human skills (mentalities and procedures) matched to these.

1. The Complexity of Civil Law Mentality

31. Within the range of utmost possibilities, the continental legal game builds up law-application processes as an analogy of the cognitive ones common to the sciences: firm platforms (as indubitable stepping stones), logified steps (inspired by mathematics), strictly methodical interpretation (of rules) and verification (of facts), all concluded to a certainty. Behind such an analogy, the lawyers' ideology assists. It suggests logical force as a necessity with no alternative. As the entire construct is humanly operated, only a role of the police officer who directs traffic at turnouts seems to have been assigned to the lawyer. And behind the scenes nothing but our well-educated professional socialisation stands, requiring that the sole right decision will be reached from all available alternatives, the one which can be identified within the polarity of either truth or falsity.

2. The Complexity of Common Law Mentality

32. From a European continental perspective, we are used to considering the Anglo-Saxon approach as freed from ideology, because it abounds in marks of unsophisticated naturalness without artificial mediatedness. No consideration is usually given to the fact that even its myth-coloured basic definition is formed ideologically from the outset. For, as is well known, that approach generates a judicial declaration of what the law *is* from the alleged positivity of the *immemorial custom of the Realm*. Moreover, it is expressly alienating by tripping the entire justice-game into lawyerly technical subtleties and tricks,

vant qualities of jurisprudence (such as unity, security, justice, and expediency), it will subject a randomly selected part of jurisprudential issues to sample-taking, in order to filter their quality. So, historically speaking, this is the origin and the mental root of a p p e a l .

in opposition to the logical clarity and transparent foreseeability of the continental *Professorenrecht*.¹² And, last but not least (and unless it creates its own subject of analysis as the result of today's analytics) its demands are strikingly *a*-theoretical, with no receptivity to conceptual issues.¹³

IV. WITH HUMANS IN THE LEGAL MACHINERY

33. In turn, “humans are hidden in the machinery” as the law cannot function without an active human component. This is obvious, since there are no “correct” answers in themselves, as no exemplar of them can be found.¹⁴ We may endeavour to reach a rational justification at the most, and through benevolent discourses in human communities, an optimum solution has to be targeted somehow. We are fallible humans, as

¹² It is no chance that legal theories of alienation were mainly formulated in the domain of Common Law. Cf., e.g., William E. Conklin *The Phenomenology of Modern Legal Discourse* The Juridical Production and the Disclosure of Suffering (Aldershot & Brookfield USA: Ashgate 1998) xii + 285 pp. [Applied Legal Philosophy]. Moreover, the exclusive purpose of the modern mainstream trend of Critical Legal Studies—cf., e.g., Richard W. Bauman *Ideology and Community in the First Wave of Critical Legal Studies* (Toronto: University of Toronto Press 2002) 257 pp.—is to unseal the relations of dominance (as its fighters claim: the capitalistic, male-chauvinistic, or European regimes, or the ones ruled by the centres of the world economy or by the CHRISTIAN faith, and so on) from the artificial ideological (defensive) linguistic cover of the law (provided with codes of mere technicality).

¹³ Almost the only exception I have taken cognisance about is Geoffrey Samuel *Epistemology and Method in Law* (Aldershot & Burlington, VA.: Ashgate 2003) xxvi + 384 pp. [Applied Legal Philosophy].

It is an alarming instance to learn from a dispute—*Ratio Juris* 20 (2007) 2, pp. 302–334—launched by Italian and Polish scholars about a volume—Roger A. Shiner *Legal Institutions and the Sources of Law* (Dordrecht: Springer 2005)—of a representative international series—[A Treatise of Legal Philosophy and General Jurisprudence (ed. Enrico Pattaro) 3]—, the doubts expressed on the sense of such a universalising bosh, which is destitute of the lowest theoretical sensitivity in the author's exclusive dealings with American daily topics under the aegis of global legal theorising, stuffed with the want of genuine academic knowledge, as if the author never heard, for instance, of the doctrine on the sources of law, legal institutionalism, or HANS Kelsen's foundational doctrine. Rounding this specimen of intellectual poverty by not even understanding the stake, in his rebutter the author calls its European critics to the respect of liberal tolerance and academic freedom, perhaps for lack of anything better.

¹⁴ In theoretical reconstruction, my concern is certainly not the validity of propositions that natural law doctrines (aiming at ontological foundations inspired by theological presuppositions) or practical philosophies (in their rebirth today) may advance

fallible as are our endeavours to make the world better. We may try to find salvation exclusively with skills and instruments we have developed, and, of course, through unceasingly adapting and correcting them.

34. Irrevocably and unavoidably, all that remains is to draw on the recognition that, notwithstanding our different societal roles, somehow we all are parts of the practice of reproducing this understanding with full personal responsibility—whether as citizens, or as educators and socialisers (who form the public understanding professionally as teachers, priests, journalists and other social workers), or as intellectuals or politicians (who shape the former’s frameworks), or having been specifically initiated as actors in the law’s workings.

35. In the final analysis, our law as actually practiced will hardly be anything other than that which we have formed out of it through our social co-operation and the fights we have undertaken.¹⁵

36. In the end, law is a mode of speaking. It is practiced as a specific field of communication with a game of open scenes, which is actualised if played by humans through actual referencing. Accordingly—and instead of “what it is?”—“all that notwithstanding: how it can be achieved” will be the final question that serves as a criterion as well.

This also involves a call for axiology, in order to set some standard as a foundational stepping stone. This is to be done even if in the absence of a claim that we have made it suitable to conclude anything from it or subordinate anything to it (as the past antagonistic rivalry between the doctrines of natural law and legal positivism stressed). And this may presume to arrive finally at a development from thesis via anti-thesis to syn-thesis related to the correlation among humanity’s natural, societal and spiritually founded intellectual world, perhaps strengthened as well by the re-/dis-solution of the law’s positivistic self-definition. Thereby, a genuine re-foundation may also be achieved in order to master humanity’s response to the global challenges that are at our door.

in search for connections, but exclusively the specific issue of the ways in which prevalent trends (or their comparable analogons) may exert fermentative effect on the daily administration of justice.

¹⁵ For an outlook, cf., by the author, ‘Doctrine and Technique in Law’ *Iustum Aequum Salutare* IV (2008) 1, pp. 23–37 {& <<http://www.jak.ppke.hu/hir/ias/20081sz/02.pdf>> & www.univie.ac.at/RI/IRIS2004/ArbeitspapierIn/Publikationsfreigabe/Csaba_Phil/_Csaba_Phil.doc}.

APPENDIX

LEGAL THEORISING

An Unrecognised Need for Practicing the European Law[★]

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1. INTRODUCTION

Queries in European and Global Perspectives

As far as challenges are concerned to find what place may Hungary occupy with her law and legal culture in the European Union after her accession to membership is concluded, first of all it seems to be suitable to trying to foresee the future in mirror of the development from recent past to the present, through a comparative historical analysis.

In accordance with this, the first item to examine is the foundational issue of the ways in which the European Union's common law issued uniformly to all its members, its administrative implementation under the promise of some well-balanced and co-ordinated uniformity, as well as its judicial application by its central law-adjudication agencies will be in the

[★] A summary of the author's *Jogrendszerek, jogi gondolkodásmódok az európai egységesülés perspektívájában* (Magyar körkép – európai uniós összefüggésben) [Legal systems, legal mentalities in the perspective of European unification: Hungarian overview – in an European Union context] (Budapest: Szent István Társulat 2009) 282 pp. [Az uniós tagság következményei a magyar jogrendszerre és a közigazgatásra] & [Jogfilozófiák], taken mostly from chapter VIII, complemented by excerpts from the chapters I and II, originally published in *Acta Juridica Hungarica* 50 (2009) 4, pp. 415–458 & <http://akademiai.om.hu/content/p35847986r2w3ww8/fulltext.pdf>.

position to exert a decisive impact on either the long-term survival or the gradual withering away of the historical specificities and relative independence of the national legal systems involved. Or, as seen from the opposite side, the dilemma of partner states is in what exactly and to what extent this law of the European Union may become a genuinely and truly *sui generis* formation indeed. Otherwise formulated, how much its creation, administrative implementation and judicial ascertainment with feasible adaptation are to become captive of the giant partners fighting with one another within the Union to extend their respective (national) influence to the rest, in order that the English, German and/or French domestic traditions can eventually be transformed into one single all-European scheme. All this covers the prospects of standing divergence *versus* final convergence of the (continental) Civil Law and the (Anglo-Saxon) Common Law mentalities; the selection of the models for, as well as the techniques and future chances of, the common codification of European (private substantive and procedural, and further on) laws; the definition of the pattern(s) followed in law-adjudication exercised by the common judicial fora of Europe; and, altogether and taken as a basis, the mapping out of both the legal traditions of the participating states by delineating their historical groups and sub-groups (with past and present co-relations and changes of shift thereof) and of their chances of either ultimate preservation or perhaps sublation—in the process of and despite their continual self-adapting transformation, in the first place as to their respective sources of the law, their conceptuality, structure and problem sensitivity, as well as the techniques and judicial reasoning they use, including its canonised skills as well.

Such dealing with the above, if exhausted by filling up similar frames exclusively, would appear as suggesting some self-offer for servile copying, albeit the way open for all new-comers is by far not of one-sense in principle. For as members of equal standing by now, we cannot take as simply given from the beginning that, just as a token and independently of us as actors (destined merely to watch the scene from a distance), in the Union's womb and through its complex chain-movement, law is getting continuously formed addressing us, too; while it is not to be taken as a self-propelling cause either that from all this some definite modification and continued change of respective domestic laws will ensue as the former's simple extension or mechanical conclusion, as in some reflex automatism. Or, just two-sensed and therefore also mutual and multi-actored this way is. Accordingly, the opposite pole of why to investigate effects will exactly be the issue, whether or not there are skills and chances hidden in our tradi-

tions, institutionalisations, particular solutions, experiences, or even practices of pressurisation, through the coming activation of which we can also assert our own interests within—and by contributing to—the European Union’s common thought and institutional action in a truly creative manner and without disrespect to its overall ideality and functional complexity.

At the same time, we had better to be aware of the fact that we actually take part in the above mechanism of mutual influencing by far not exclusively with consciously pre-planned steps and patterns. For there is a brute fact, namely, the one of our relative Central & Eastern European impotence resulting from our specific historical conditions. For the region’s Communist past, which spanned over nearly half a century to detach it from the daily Western European and Atlantic routine, has driven all those concerned to forced paths, diverting them from the very chance of any organic development. Or, this past made own practices developed and enforced throughout the West, against which we, Hungarians, for example, may now call back our own historical (and partly also nostalgic) remembrances (to former efforts at state-building, bourgeois revolution, liberal governance up to our involvement in the First World War, struggles between the two world wars, or, lastly, republican foundations during the short coalition period after the second worldwide catastrophe) at the most, which, however, inevitably and in the strictest sense, had also cut us off from contemporary Western European and Atlantic practices developed in their after-war recovery and afterwards, by having transformed our traditions into a historical *for e* pattern anchoring in their already distant past. That is, our ideals became in the meantime dated as mere remembrances rooted in the very past of Western civilisational patterns, forbidden and denied for us at their time, while we could hardly get own experience from their daily practices, evolved with them through nearly half a century. Therefore, eventually and in the last analysis, in both facts and ideals we are in a remarkable phase delay. For this very reason, the issue is also bound to be raised how much will our overall heritage—*nolens, volens*—affect our near future as an in-built impetus given.

Based upon own potentials, we are already both new members and constituent parts of—with shared ability also to contribute to—this unifying Europe. Therefore we are expected to answer the query for sustainability in a sensitive manner, namely, to rate what kind of future can be prognosticated for us in the dilemma of preservation mixed by mutual influences or assimilation under the pressure of overweighty partners, and also what kind of role traditions historically evolved may play in forming all this, defining its

basic directions while transforming themselves into a conservative antipode in control of current adaptations, as main factors to strengthen internal forces needed so much for facing current challenges effectively and in an adequate manner.

Of course, plenty of researches have been carried out in Western Europe concerning various aspects of such and similar topics, even if in a rather isolated contexture. Neither panorama nor developmental perspective has been offered by them till now. As series of analyses within the reach of positive law and closed down in its well-established theoretical framework, they have been mostly building on their prevailing outlook as some ready-made recipe, without sensing the paradigmatic novelty of the total move which is going on anyway now with universal historical significance. Consequently, in want of own conceptualisation and methodological foundation, they have simply extended (insufficiently and by far not adequately, by the way) that what is anyhow prevalent as given in their everyday domestic routine. And still, own participation with own abilities necessitates own answers, specific of own challenges, as has ever been used in—and in a manner worth of—social sciences.

2. BASIC ISSUES

2.1. *Human Refinement*

The European integration is one of the greatest victories of centuries, perhaps of millennia, as a development that may predestinate the mankind's overall fate for a long period of time. For such an institutionalisation of channels of international collaboration on a voluntary basis and launched in every step by co-operative participation is a hardly overvaluable advance in the *homo sapiens*' history. It is to note that not more than ten generations divide us from feudal particularism only, which presumed continuous group-fight with altering chances. It might result in some profit for occasional winners but it caused mostly lost (if not plain destruction) for nations and states concerned. In huge regions of the West of Europe where enemy in the proper sense (i.e., external power threatening our commonly shared civilisational values) had never menaced survival, mostly also CHRISTIAN princes, and overlords sworn to the same God hankered for, or borne a grudge against, the property of their *similia*. Castles undamaged we admire in the Western hemisphere today as historical monuments are furnished with all imaginable defensive arts against those (yesterday perhaps still

friend and fellow-in-arms neighbour) rounding on our life, property, spouse, and power equally, while we know that eventually no human artifice can save anyone arrived to the top on earth against the intrigue of others, aspiring with the same fighting spirit to the same arrival. Well, we may wonder at our still pre history of a nearly recent past, how the refinement—or self-ennoblement—of human race proved to be relative for long centuries: scarcely less than two millennia later that the message of CHRISTianity (in company of other world religions transmitting legacies basically concordant with the above) had become the common language of our predecessors.¹

Coming nearer to our present, just a bit more than half a dozen of generations' period separate us from the age when by force of his arms NAPOLEON aspired to found a Europe-like empire, and our parents still might live red, then brawn and yellow dictatorships that made efforts to form global empires by mere power. In history, the borders of causalities and coincidences often grow dim, since in a stage of constant and mutual expansion—in a modern state of *bellum omnium contra omnes*, later in variations of waging warfare and concluding peace treaties (making place to one another in a forecalculable sequence), and, as the achievement of our modernity, hardly cramped by the so-called international law either then or since then—every state actor experiments with optimising its situation legally, by setting in sheer power techniques and by making a defensive ideology out of its actually followed practice alike (putting it as a troubling issue to the posterity whether or not in the final analysis the catch words of the CHRISTianity, ruled by the Church's adopted politics, or, later on, the ones of democracy—that is, the attention to be paid to and by the public opinion—had been confined to this); and, with the wisdom of posterity at the most and with no little resignation—most of all *post festam*—we take notice of the fact that, with some variations in resemblance but still coming from common descendance, the same spirit of the age has materialised in one of them and perhaps also in the other, maybe coming out as the winner of the given conflict.

¹ It is worthwhile recalling the fact that sociological essays are used to report about re-feudalisation as a still strangely viable phenomenon also in Europe, in the very periphery of the European Union, whose stage of development is described most adequately in terms of Pierre Corneille's drama *El Cid*, reminding of the Iberian states during the 11th to 13th centuries. Cf., e.g., Vladimir Shlapentokh *Russia Privatization and Illegalization of Social and Political Life* (Michigan State University Department of Sociology: 25 September 1995) 44 pp. {CND [Chris Donnally] (95) 495}.

Notwithstanding all this, it was in such a confrontation among nations that international law began to regain new strengths (together with its immensely considerable and varied professional branchings off by today), in line with and also resulting in the proliferation of international organisations, which were sometimes destined to become straightforwardly a legally circumscribed world state substitute, sometimes established to fulfil strictly delimited duties, considered as necessary; however, they had a common mark in that they were given a particular—and *sui generis*—legal status. Today's American hegemony has formed in the same way, in the world-wide interaction of giving and receiving, using all available potentials as defined by the actual challenge and the desirable response, which recontextualises also international law in a new paradigmatic situation.² Today this direction is coupled—if not identified with the former in its entirety, despite numerous interlocking it has—with the trend of globalisation, basically revolving around a world-economic interest. Filled with the taste of progressing in progress and bearing the purifying and self-recreating effect of the Enlightenment, not even these times might we answer otherwise the question once formulated by the Academy of Dijon, calling the farsighted vision of JEAN-JACQUES ROUSSEAU about the ennoblement of morals, than by saying that: our instruments are constantly refined—although, and with returning generality, endeavours striving to reach the end have in the meantime become still more implacable, in result-maximalisation more inconsiderate, because by being capable of setting more refined technologies, they may envision a still by far more total effect.

What and how will be precipitated in our legal thinking and in our theorisation on law from all this? According to the shortest reply: much and little at the same time. Theoretical reflection seems to be always retarded. This is as if our earlier conditions were too forceful, since the possibilities within the prevailing frameworks are almost limitlessly able to pursue the old paths undisturbed, by adapting the known ones, and open for cautious developments. Nearly this is what we can learn from explorations into the historical

² Robert E. Gooding 'Toward an International Rule of Law: Distinguishing International Law-breakers from Would-be Law-makers' *The Journal of Ethics* 9 (2005) 1–2, pp. 225–246 raises the straightforward issue that the claim of »rule of law, not of men« formulated within a state has been changed to »rule of law, not of states« in relations among states (p. 227); however, in case of the overdominance by a superpower risen there is hardly any guarantee for voluntary and one-sided moderation—beyond the hope that international co-operation will be effective enough to “really internalize the settled rules governing relations between »civilized nations«.” (p. 229)

logic of scientific development. Namely, advance is carried on within the frame of paradigms already formed; theorising upon new recognitions is achieved by gradually dissolving the tensions which are faced in this body of knowledge undertaken unchanged from the earlier period, and, this way, also mitigating them in consideration of its future; and it is only somewhen, at certain historically exceptional periods, that all this may turn to be over the limits of tolerability—moreover, most frequently not even as the necessary effect of circumstances that cannot be explained otherwise in epistemology than as the issue generated by trout-fly, secondary, merely coincident phenomena, or by external forces, or after a chance of breaking through is recognised—when, perhaps, a new paradigm will be born.³

Moreover, in law, the practicing of and theorisation on which is unchangedly cultivated mostly as closed within state boundaries and predisposed of the own cultural inveteracy, we ourselves seldom become cloven and duplex. Instead, we expand rather our suitable practices and habits to new territories—simultaneously as test and experiment—for that we may carry on chasing what is already *w e l l - k n o w n* (by its further analytical exploration, synthetic re-definition in larger contexts, as well as reaffirmation in extrapolations), proceeding on on ways that are made safe thereby. It is in this sense that the present haunts. For we are inclined to see pretence, opportunity, and new experiment of extending ourselves—our past and experience—in this new European reality, rather than trying to sense, recognise and theorise it as a *s u i g e n e r i s* actuality, with both readiness measured by and approach adequate to it.

2.2. *The Westphalian Heritage of State Law and International Law*

Anyway, there is some implicitness dominating our jurisprudential thought, functioning as sieves of professional socialisation, on the one hand, and as the filtering agent of verification, on the other. It may serve as an aggregate of habitual criteria on both sides of the input and the output, defining primarily what can be thought of law.

For us, interestingly here and now, such implicitness is forwarded first of all by taking the so-called *W e s t p h a l i a n d u o*—that is, dividing up

³ Thomas S. Kuhn *The Structure of Scientific Revolutions* (Chicago: University of Chicago Press 1962) xv + 172 pp. [International Encyclopedia of Unified Science]. Cf. also Erich vom Dietze *Paradigms Explained* Rethinking Thomas Kuhn's Philosophy of Science (Westport, Con.: Praeger 2001) x + 182 pp. and James A. Marcum *Thomas Kuhn's Revolution* An Historical Philosophy of Science (London & New York: Continuum 2005) ix + 182 pp. [Continuum Studies in American Philosophy].

the law's world to nation-states, ruled by domestic regimes, on the one hand, and international law, serving as the governing principle amongst such states, on the other—as a basis. In conformity with the latter's underlying origin, nature and operation (despite huge efforts anyway), international law is until today pulpy and fluid, rugged in all its components as forming day to day, since due to its occasionality and weakness in centralisation, it is not summed in reliably comprehensive and completed doctrine.⁴ This is why now—à propos the “international rule of law”—great feelings of its defect are formulated, recognising the need of determined steps to overcome it through various forms of promotion.⁵ Since it is a common experience that as soon as international power balance is split (by the practical dissolution of the League of Nations in the late interwar period or the end of bipolarity after the fall of the Soviet Union now), hegemonic interest is to prevail again (visibly *vis-à-vis* others),⁶ as backed by the standing and well-known celestial solemnity of references made to superb and unchanging principles.

In turn, national laws are used to be seen in the duality of the continental Civil Law and the Anglo-American Common Law (or, in triality, as complemented to by the so-called mixed regimes), when their established technicalities, institutional networks, or firm foundations in basically developed doctrines (or doctrinal outlines) are considered. Here and now, it is not their actuality that may be seen as problematic but their unproblematic reception as something given from the outset as an exclusive natural fact. For it has some imperialistic undertone when the process of ongoing globalisation, sheltering behind all present moves, is also taken into account; when it ignores the broadening of the topics of investigations devoted to social formalisms by social theories since the beginning of the 20th century; when it features up the standing imprints of Euro-centrism or ethno-centrisms. Since the epoch of EUGEN EHRlich and MAX WEBER, so-called non-state laws as well as the cases of legal pluralisms, deriving from some parallel

⁴ Nevertheless, for its demand, see, e.g., Niilo Jääskinen 'Back to the Begriffshimmel? A Plea for an Analytical Perspective in European Law' in *The Coherence of EU Law The Search for Unity in Divergent Concepts*, ed. Sacha Prechal & Bert van Roermund (Oxford & New York: Oxford University Press 2008) xlii + 531 pp. [Oxford Studies in European Law], ch. 18, pp. 451–461.

⁵ Cf., e.g., Martti Koskenniemi 'The Politics of International Law' *European Journal of International Law* I (1990) 1–2 {& <<http://ejil.oxfordjournals.org/cgi/reprint/1/4>>}, pp. 4–32.

⁶ Cf., e.g., as a cry out, by Diarmud Rossa Phelan *It's God we ought to Crucify* (Fiesole 1992) iv + 117 pp. [EUI Working Papers: Law 92/33].

and/or concurring predominance, have also called the undivided attention of jurisprudential (legal sociological and anthropological) research.⁷ Or, when we are invariably footed in the so-called Western Law, we are tempted to attribute low relevant significance to legal traditions far from us and named simply as “others”, lived and living almost undisturbedly in the greater part of our globe, that is, to traditions which we consider mostly as parts of their religion but which are often the indistinguishable and by far not definitely unsuccessful parts of a comprehensive world-outlook, working well in their own traditional environment and medium. And this narrow-minded focus may have proved to be persistent with us at a time when we actually have not yet developed any truly general or, in the strict sense of the word, *universal legal theory*⁸—unless we count as such with such caricatures as afforded by HANS Kelsen’s positivism (as to a European continental version), or the analytical trend (as to the British pattern), in addition to (as the historical predecessor of all jurisprudence ever undertaken) the *catholicos* claim for universality as offered by the classical teaching of the philosophy of natural law.

2.3. *The Place of European Law*

Where can one find the place of European law? For that what may be seen from the representations of European legal literature as a synthesis is of quite uncertain contours without theoretical message, even if spiced with historico-political arguments occasionally, mostly covering or substituting to national interest pressed. Even in monographies the cacophony of incidental remarks can only assure some perspective, namely, from outside. The nationally diversified normative stuff will remain separated, perhaps with the sole exception of doctrinal propositions to prepare some common codes of the European Union. They, in turn, seem to reincarnate the idea having once prevailed in conceptual jurisprudence,⁹ with abstract notional-

⁷ For basic issues related, cf., by the author, ‘Theory of Law – Legal Ethnography, Or the Theoretical Fruits of Inquiries into Folkways’ *Sociologia del Diritto* [Milano], XXXVII (2010) 1, pp. 82–101 {abstract on pp. 222–223} {& in <http://www.francoangeli.it/riviste/Scheda_Riviste.asp?IDArticolo=39637&Tipo=Articolo%20PDF&lingua=it>g}

⁸ As a demand for it, cf., by the author, ‘Összehasonlító módszer és jogelmélet’ [Comparative method and legal theory] [1973] in *Útkeresés Kísérletek – kéziratban* [The search for a path: unpublished manuscripts] (Budapest: Szent István Társulat 2001), pp. 97–101 [Jogfilozófiák].

⁹ Cf., by the author, ‘Leibniz und die Frage der rechtlichen Systembildung’ in *Materialismus und Idealismus im Rechtsdenken* Geschichte und Gegenwart, hrsg. Karl A. Mollnau (Stuttgart: Franz Steiner Verlag Wiesbaden 1987), pp. 114–127 [Archiv für Rechts- und Sozialphilosophie, Beiheft 31].

ity defined within an established systemicity that is backed by the professionally shared belief in the creative force of human rationality. This is completed by the hope that constructions thusly gained will embody final rationality.

We can perhaps get a more sensitive picture by also counting with the fact that „Forging a legal Europe and post modernism are just complementary to one another.”¹⁰ For in this case, too, the multiple mediations through which the formalisms in the operation of European institutions are filtered—with priority guaranteed to common institutional manifestations (directives and decisions) while, on the other end of the operational mechanism, a through and through filtration will be achieved by the national agent interpreting all these (just enabling us to conclude that, after all, neither “supranational monism” nor „centrality of domestic law” taken separately but a compromise reached by both simultaneously shall prevail¹¹)—push us back from the illusory hope of certainty to the mere facticity of uncertainty.

From the perspective of methodological thinking, we may perceive the same transformation process already realised in social sciences at an early stage of the 20th century, when the notional purity of rule- or statutory positivisms was corroded by sociologisms also entering the field, that is, by the positivism of facts.¹² Nurtured by earlier expectations (and not without firm grounds), all this had first imprinted minds with the fear of genuine anarchy; getting gradually replaced by a functionalist view of society, which could only take a more or less solid theoretical form after long debates on the issue of priority and attempts at final subjection, by the second half of the century. On its turn, this new concept was from the beginning based on plural actors and the endless series of social interactions, changing the mythical *definitivum* of some primary act, or creative intervention and final determination, to the functional interdependence of partial complexes in actual co-operation. This has

¹⁰ André-Jean Arnaud *Pour une pensée juridique européenne* (Paris: Presses Universitaires de France 1991) 304 pp. [Les voies du droit], p. 300. [„Élaboration d’un Europe juridique et post-modernisme vont de pair.”]

¹¹ Massimo La Torre ‘Legal Pluralism as Evolutionary Achievement of Community Law’ *Ratio Juris* 12 (1999) 2, pp. 182–195 on p. 192.

¹² For the debate in *Archiv für Rechts- und Wirtschaftsphilosophie* during the years 1916 and 1917, see *Hans Kelsen und die Rechtssoziologie Auseinandersetzungen mit Hermann U. Kantorowicz, Eugen Ehrlich und Max Weber*, hrsg. Stanley L. Paulson (Aalen: Scientia 1993).

resulted in the dissolution of legal positivism¹³ while arriving at a new, relatively well-balanced state.¹⁴

Once the certainty of all the uncertainties inherent in the state of post modernism is reflected upon the complex of European law, one can reach some points of orientation. First of all there is a striking common experience in that everything even in a loose connection to it seems to have been permeated by a kind of “missionary zeal”.¹⁵ This is characterised by both its weigh and extraordinarity, formative of the future of European history, and the fact that it lacks any strictly circumscribable subject. For today “a reactive, event-driven and context-dependent approach to EU legal studies” is the mainstream,¹⁶ considering the fact that the

“European Community law represents more evidently perhaps than most other subjects an intricate web of politics, economics and law. It virtually calls out to be understood by [...] an interdisciplinary, contextual or critical approach.”¹⁷

The medium itself in the womb of which all this is to happen is the fluid state of ceaseless being something and becoming something else as well, since “The EU, after all, is a polity in the making”.¹⁸ The European law as it

¹³ Cf., e.g., by the author, ‘What is to Come after Legal Positivisms are Over? Debates Revolving around the Topic of »The Judicial Establishment of Facts«’ in *Theorie des Rechts und der Gesellschaft* Festschrift für Werner Krawietz zum 70. Geburtstag, hrsg. Manuel Atienza, Enrico Pattaro, Martin Schulte, Boris Topornin & Dieter Wyduckel (Berlin: Duncker & Humblot 2003), pp. 657–676 and—exemplifying the positivism’s dissolution in a case-study—‘Meeting Points between the Traditions of English–American Common Law and Continental–French Civil Law (Developments and Experience of Postmodernity in Canada)’ *Acta Juridica Hungarica* 44 (2003) 1–2, pp. 21–44 {& <<http://www.akademai.com/content/x39m7w4371341671/?p=056215b52c56447c8f9631a8d8baada3&pi=1>>}.
¹⁴ Cf., by the author, ‘Macrosociological Theories of Law: From the »Lawyer’s World Concept« to a Social Science Conception of Law’ in *Soziologische Jurisprudenz und realistische Theorien des Rechts* ed. Eugene Kamenka, Robert S. Summers & William Twining (Berlin: Duncker & Humblot 1986), pp. 197–215 [Rechtstheorie, Beiheft 9] {& ‘Macrosociological Theories of Law: A Survey and Appraisal’ *Tidskrift för Rättsociologi* [Lund] III (1986) 3–4, pp. 165–198}.

¹⁵ Neil Walker ‘Legal Theory and the European Union: A 25th Anniversary Essay’ *Oxford Journal of Legal Studies* 25 (2005) 4, pp. 481–601 at p. 586.
¹⁶ *Ibid.*, p. 583.
¹⁷ The first time by Francis Snyder ‘New Directions in European Community Law’ *Journal of Law and Society* 14 (1987) 1, pp. 167–182 on p. 167.
¹⁸ Jo Hunt & Jo Shaw *Fairy Tale of Luxembourg?* Reflections on Law and Legal Scholarship in European Integration in <<http://64.233.183.104/search?h=cache:F42D5KPUYG8J:www.sheffield.ac.uk/content/1/c6/06/90/87/Hunt%2>>, p. 5.

is at any given time is the first of those factors shaping the commonness in Europe at any time; and what is known presently as the European Union is the prime factor to form the European law—in an interdependence and with a mutually conditioning force that, beyond the dynamics of their mutual effects and self-sustaining output, there is almost no fix(ed) point to relate to them in the manner of ARCHIMEDES. Therefore one may state it without sheerly rhetorical overestimation reaching a dead-end that “there is simply no single answer to questions such as: what is the legal constitutional nature of the EU, and what is the role of the law in the governance of the EU?”¹⁹ For all this is about the specificity of the European law’s ontological nature and its self-determination through the mutual definition of the forces working in its just-so-being. Just in the way as the European law’s criterial component “conditionality attached to supremacy is not a temporary aberration, but a permanent feature of the EU constitutional order.”²⁰—since it is also to show those apparently (self-)contradictory features that can at all be interpreted within the dynamism of the total whole, taken as a process. Even the constitutional foundations of its structure can be best described in the enigmatic but reliable language of legal and political philosophy—in the way, for instance, that the relationship between the Union and the domestic national orders is “pluralistic rather than monistic, and interactive rather than hierarchical”.²¹

In the evergreen polemics of legal theory whether it is the rule that makes the law (as suggested by the transformation of *regola* into rules with the ancient Romans and by the axiomatic conceptualisation in early modern continental Europe) or the law’s presence, with the quality of juridicity, will only be revealed through the judicial event (as ever professed by the experimental pragmatism of the Anglo-Saxon wisdom), there is a new contribution to the underlying issue by the conclusion, maybe shocking for the first time, according to which “The European Union’s legal system has become the most effective international legal system in existence, standing in clear contrast to the typical weakness of international law and international courts.” For all this is nothing but the outcome of the fact that in the politi-

¹⁹ *Ibid.*, p. 21.

²⁰ *Ibid.*, p. 14.

²¹ Neil MacCormick *Questioning Sovereignty* Law, State, and Nation in the European Commonwealth (Oxford & New York: Oxford University Press 1999) x + 210 pp. [Law, State, and Practical Reason], p. 118.

cal processes of the European Union the European Court(s) of Justice and the national courts have become co-actors in imposing a common will, called European law, on the governments of member states.²²

3. ANALOGIES

3.1. Solar System with Planets

There is a methodologically inspiring symbolic expression provided by the metaphor of “solar system with planets”, based on the various forms of interaction and interdependence between the intellectual tradition embodied by the *ius commune* as the once European jurists’ law, on the one hand, and its local applications, on the other. According to a learned author,

“MANLIO BELLOMO—*L’Europa del diritto commune* 6th ed. (Roma: 1993) 205–206—has used the imagery of the *Ius commune* as the sun and the *iura propria*, the legal norms of kingdoms, principalities, and city states as the planets to explain the relationship of the *Ius commune* and *iura propria*. The metaphor is perceptive and accurate. The sun is not an inert mass, without energy or gravity that does not exercise any influence on the planets. To describe the sun as a great theoretical star in the sky that has no real life or influence of its own would be silly. On the other hand, the planets have their own conditions, forces, norms that regulate their self-contained worlds. Each planet has a different set of rules, but each is affected in different ways and from a different distance by the energy of the sun. No planet would reject the sun; it would be folly and unthinkable. The result would be chaos for the planet’s system. My conclusions can be stated succinctly: The *Ius commune* was not bookish law, was not the law of the greats, to be read, savored, and returned to the shelf, was not learned law in contrast to real law. It was the cauldron from which all European legal systems emerged.”²³

Such a metaphor, I guess, can serve as a convincing analogy to describe the simultaneously centrifugal and centripetal, unending moves characteristic of the cases of legal pluralism, and most of all, the actualisation/implemen-

²² Karen J. Alter *Establishing the Supremacy of European Law* The Making of an International Rule of Law in Europe (Oxford & New York: Oxford University Press 2001) xxvi + 258 pp. [Oxford Studies in European Law], p. 1.

²³ Kenneth Pennington ‘Learned Law, Droit Savant, Gelehrtes Recht: The Tyranny of a Concept’ *Syracuse Journal of International Law and Commerce* 20 (1994), pp. 205–215 {& <<http://faculty.cua.edu/pennington/learned.htm>>}.

tation of the European law as unity in principle, showing certain diversity of practice at the same time. Otherwise expressed, this means that once some depth is actually reached by the process of European integration, there will also be some inertia and gravitational force in work as well, which may ensure that its law, independently of how it operates in fact, will also be able to exert its continued impact, feeding back, of course, the challenges it is to respond to, even if mostly in a rather indirect manner.

As it will be cleared up in the following paragraphs in more details, it is the pluri-directional move by plural actors (with the overwhelmingly massive force that is to be formed anyhow in the womb of such movements) that will specify the particularity of the operation of European law.

3.2. *Pre-modernity, Modernity, Post-modernity*

The amalgam that the operation of the European Union is, exhibits a variety of features ranging from premodern, through modern, to postmodern.

P r e m o d e r n, insofar as it genuinely reverberates with echoes of the *ius commune* tradition.

Yet, at the same time, European law exhibits features of *m o d e r n i t y* as well. It carries on with the tradition of legal positivism, yet at the same time, we recognise the process of the classic nation-state being transposed rigidly into the rather different setting of the succeeding new age, in tandem perhaps with the potential stigmas attached to being out of date, and showing signs of being artificially produced—a result of the forceful nature of the process. Efforts and attempts aimed at producing European common law have thus far been located along more or less exclusive codification strategies, and have attributed primacy to the systemic idea,²⁴ and subscribe to the notion of law being susceptible to being fixed in a chosen form onto the skeletal structure provided by the formulae of rules.

Additionally, the air of *p o s t m o d e r n i t y* also permeates this sphere. This becomes tangible through the way the innumerable directives (that are not only capable of creating internal tensions among one another, but even of completely cancelling the effects of each other) are to practically overwrite the body of rules comprising European law. The fundamental cause of this reversal is that these rules are only enforceable through actualisation by the courts, that is, via adjudication governed by value judgments

²⁴ For their variegated adventure, cf., by the author, *Codification as a Socio-historical Phenomenon* (Budapest: Akadémiai Kiadó 1991) viii + 391 pp.

and the weighing of conflicting interests, which are essentially authoritative proclamations produced in decision-making scenarios.

This is a postmodern construct, accepting the primacy of principles over rules to the extent that, for example, the equality of languages natively dissolves in the cacophony of regulations that which (although in and of itself can be perceived as merely text) may nevertheless no longer be monocultural even in its simple textuality, since it is floating above the individual culture specific languages of all member states. Also to the extent that the community actions are—intentionally, due to one of the most fundamental principles determining the nature of this construct—subjugated to the various specific interpretations (arbitrary choices) produced by member states based either on powers afforded by a status of local autonomy or other powers exclusive to the given jurisdiction. Also to the extent that, by extending the freedom of the choice of the law, it gives rise to the coexistence of competing national forums, which combined with the freedom of contract and of enterprise ultimately gives way to a certain favoured legal system (or systems) gaining monopoly status along with the other (or others) becoming hollow from a practical perspective (since even their remaining degree of sovereignty is thusly rendered inconsequential). In other words, also to the extent that although the powers of the national (as in member state) entities are theoretically preserved, nevertheless, in the practical realm, a continent-wide globalisation has (already) been put into motion by practically almost fully liberalising the marketplace of initiatives and allowing freedom of choice among the various relevant legal regulations. Consequently, the potential outcome of this process could be that in fact the status of the state may soon become largely nominal indeed—because of the freedom of enterprise and of commerce. The reason for this is that in the case of giant commercial enterprises comprised of freely constructed concentrations of influence that are the most successful in the battle to acquire the largest market share, the *de facto* force upholding order increasingly resides with the players themselves, as their legal agreements tend to designate as arbitrators of their potential legal wrangling certain agencies commissioned to act as forums producing rulings on their disagreements. When the relevant provisions are composed with an appropriate level of sophistication, it is even possible to create a legal construct, whereby even the courts of the European Union may end up having a rather limited practical influence over these paralegal or non-legal procedures.

4. THE STRUCTURAL PATTERN OF THE EUROPEAN LAW

4.1. Legal Culture of the European Union

Well, using a multi-tiered image of the potential wholeness of law,²⁵ it is possible to distinguish three different layers:

<i>l a w</i>
<i>surface level</i> (legal rules, case law, etc.)
<i>legal culture</i> (legal concepts, general principles, lawyer's methodology)
<i>deep structure</i>

And strange as it may sound, our conclusion is that so far the legal setup of the European Union appears to have reached only the first level.²⁶ To put it differently, the culture and core structure of European law, i.e., its conceptual, theoretical, and methodological assets, and its doctrine (in the sense of a *Rechtsdogmatik*) have not been fully formulated, its wholeness has not been attained by far.

Truly, that which is commonly referred to as the o b j e c t i f i c a t i o n o f l a w²⁷ has been present for quite a long time, and it has materialised in the form of a solid amalgam block of a rather chaotic composition. The contracts concluded with the European Union, the directives and other positive sources of law emanating from the representative and governmental bodies representing the European Union, furthermore, the corpus of its own juridical rulings—beyond the transposed and adopted elements, i.e.,

²⁵ Kaarlo Tuori 'EC Law: An Independent Legal Order or a Post-modern Jack-in-the-Box?' in *Dialectic of Law and Reality* Readings in Finnish Legal Theory, ed. Lars D. Erikson & Samuli Hurri (Helsinki: University of Helsinki Faculty of Law 1999), pp. 397–415 [Forum iuris], p. 403.

²⁶ Thomas Wilhelmsson 'Jack-in-the-Box Theory of European Community Law' in *Dialectic of Law...*, pp. 437–454 at p. 449.

²⁷ Cf., by the author, 'Chose juridique et réification en droit: contribution à la théorie marxiste sur la base de l'Ontologie de Lukács' in *Archives de Philosophie du Droit* 25 (Paris: Sirey 1980), pp. 385–411.

in addition to the body of *acquis*—have objectified the law. Nonetheless, to this day no palpable certainty or generality has evolved out of this: neither do we see an already crystallised form of legal conceptualisation, nor do we notice a strategic construction happening along a set of principles producing a balanced construct, and even whatever could be understood as being a more-or-less consensual methodology is lacking from the process.²⁸ And certainly, in the absence of all of these obviously no genuine doctrine exists, unless we consider this term to cover even those compendia released by authors (which are subject to being revised or rewritten with perhaps daily frequency), that seem to report every single development structured in whatever form of a grouping, and which tend to be rather void of genuine thought regardless of being produced under the guise of bona fide science.

Still, the stuff comprised of accumulated normative materials resembles at best—even with the best of intentions—the critical mass produced by the layers of deposits formed on top of each other left behind by a long tradition of Anglo-Saxon case-law. So it resembles an incomprehensible heap that can only be penetrated via the use of some method of creating subgroupings based on typification, which then has the effect of reducing the apparently inherent, native chaos. This can be achieved by identifying certain precedent-blocks that do in fact exhibit truly significant differentiating features when examined from a specific perspective; yet we are well advised to keep in mind that no one such structural construct should be considered absolute or exclusively valid in its given form, nor is it in any way predestinated, because using a different set of principles or method in trying to create/perceive order can produce another reasonable breakdown of interconnected units. Consequently, it would be just as misguided a self-deception to call this an order or a system²⁹ as it would be to recognise some sort of correlation in the very formal deductive thinking applied some time ago by LEIBNIZ when attempting to form the corpus of the perfect language, the total conceptual system, and the finalised knowledge (the ghost of which also resurfaced in connection with the attempted configuration/treatment of law

²⁸ See, by the author, 'Law and its Doctrinal Study (On Legal Dogmatics)' *Acta Juridica Hungarica* 49 (2008) 3, pp. 253–274 {& <<http://akademaii.om.hu/content/g352w44h21258427/fulltext.pdf>>}.

²⁹ Cf., by the author, 'Law and its Approach as a System' *Acta Juridica Academiae Scientiarum Hungaricae* 21 (1979) 3–4, pp. 295–319 {& [re-print] *Informatica e Diritto* [Firenze] VII (1981) 2–3, pp. 177–199}.

by scientific methodology as a system in DAVID HILBERT's axiomatism-ideal³⁰ as being the test of genuine scientific value), which mandated that all individual components be attributed the prestige of an axiom,³¹ due to what in reality was a complete lack of theorems, while with all of this would merely create the trap of self-destruction because our procedure would in fact cause the notion of axiomatics *per se* become totally senseless.

If we dared even to arrive at any conclusion based on this negation and finding of incompleteness, then our first one would obviously be that the developmental process as it stands today can only be understood as being *p a r t i a l*, because in our view even its already established would-be foundations and its superstructure to be occupied are lacking: we perceive the presence of only coordinated intentions and actions, rather than that of an actually unified community.³² We consider as the next relevant observation the notion that there is a remarkable absence of a fully developed common legal culture, which results in numerous further *r e t a r d a t i o n s*, thereby multiplying the amplification of its own effect. And finally—as our third, although somewhat quietly whispered observation—we would like voice our increasingly strongly held belief that in European law—a giant conglomerate of uncertain generality (due to all of its components being fragmented by special as well as conflicting interests)—the specific details of common desires and commitments can be *overwritten* by *p a r t i a l* aims that appear to show an increasing level of *i n d e p e n d e n t* existence. And in this we can expect a result no better than something *i m p r o v i s e d*: a step-by-step progress, predictable planning by default hampered by compromises, because what could otherwise be conceptually coherent progress can easily be (and predominantly is) overwhelmed by *ad hoc* answers produced with daily regularity. In other words, we have what is an institutionally well-formed giant structure, which has been filled with meaning and is furthermore operated

³⁰ “I believe that all that can at all be an object of scholarly thought is, by achieving its maturity for theory-building, suitable for axiomatic elaboration and thereby also for mathematisation.” David Hilbert ‘Axiomatisches Denken’ *Mathematische Denken* LXXVIII (1918), p. 415 {reprint in *From Kant to Hilbert A Source Book in the Foundations of Mathematics*, ed. William Bragg Ewald (Oxford: Oxford University Press 1996), pp. 1105–1115}.

³¹ Cf., by the author, ‘The Quest for Formalism in Law: Ideals of Systemicity and Axiomatisability between Utopianism and Heuristic Assertion’ *Acta Juridica Hungarica* 50 (2009) 1, pp. 1–30 {& <<http://www.akademiai.com/content/k7264206g254078j/>>}.

³² Just as one signal, as to sociological foundations, see Olivier De Schutter ‘Europe in Search of its Civil Society’ *European Law Journal* 8 (2002) 2, pp. 198–207.

the underlying cultures in the background cannot guarantee legal security. And although contracts are the most technical field of all relationships within the bonds of the private/civil/business law, what is hitherto elevated to a community level is mostly the chaos of casualism. All that notwithstanding, however, gradual convergence in a kind of frameworking regulation can be surely foreseen.

The situation is similar in case of the common judiciary as well. The roles and mixed styles of, as well as the various interpretations by, the European Court of Justice are overviewed so that conclusion as to the nature of pluralism and alleged juristocracy characteristic of legal operations of the European Union can be drawn. Roles in substitution to both the European Union constitution and internal law harmonisation, extended to penal law, representing the entire European Union law and order and working in the law's silence as well, undecided whether in a casual or precedential manner but striving for sensitive institutional balance all through, while testing a new large-organisation operational structure, are all at stake here.³⁵ Style is French-type decision making complemented to by English-type general-advocating intervention. Interpretation is complex in methods, plurilingually based, fertilising general principles with dubious certainty and foreseeability of the law in end result, as fed back by the variety of national reactions and autonomously actualising implementations eventually.

Naturally, the question may be raised, how could a fresh culture in a developmental state have its own tradition.³⁶ Well, as much as this kind of an observation is proposing a sensitive excuse, it is just as much based on a misunderstanding, since culture is not a matter of time period. So in culture we ought not merely look for the length of time continuum as the sign of having been canonised by a sense of tradition, it is not the mere fact of a period of time having elapsed, rather what we find more crucial is that the

³⁵ Cf., by the author, 'Szerepfelfogások és stílusok az európai bírászkodásban' [European judiciary: Roles and Styles] *Állam- és Jogtudomány* XLIX (2008) 3, pp. 281–315 {reprint in his *Jogrendszerek, jogi gondolkodásmódok az európai egységesülés perspektívájában* (Magyar körkép – európai uniós összefüggésben) [Legal systems, legal mentalities in the perspective of European unification: A Hungarian overview – in an European Union context] (Budapest: Szent István Társulat 2009) 282 pp. [Az uniós tagság következményei a magyar jogrendszerre és a közigazgatásra] & [Jogfilozófiák], ch. VI.

³⁶ E.g., Mark Van Hoecke 'European Legal Cultures in a Context of Globalisation' in *Law and Legal Cultures in the 21st Century* Diversity and Unity [23rd IVR World Congress, August 1–6, 2007, Cracow, Poland, Plenary Lectures] ed. Tomasz Gizbert-Studnicki & Jerzy Stelmach (Warszawa: Oficyna 2007), pp. 81–109 at p. 83.

concept that we characterised as culture be permeated—as a native feature—by the intent to pass tradition on.³⁷ However improvisational the present state of the European law is, by applying this method, theoretically we may be able to recognise those places of more intense concentration that do in fact point in this kind of a direction, and which therefore are undoubtedly identifiable as being present. Of course, the awareness of tradition building is not enough. For, as its is widely expressed, “But the European Union, like any state, needs symbols, memories and myths that can be the foci or catalysts of emotional attachment.”³⁸ However, from another perspective—that of the nations adopting the common rules—it is worth pondering the fact that the instruments of European law tend to just be tossed mechanically onto the pre-existing traditional body of law without being organically integrated, or at least an attempt being made at their successful integration. For the “European rules are literally copied and inserted into domestic legislation, without even any attempt to integrate them into a new coherent whole.”³⁹ And this holds the fact notwithstanding that the genuine effects shaping domestic laws can be characterised as depending upon factors on the merge of the extra-legal as all “it is less a matter of positive law than of legal culture.” Consequently, the supposed interaction taking place in the cultural context, which is in fact defined as being based on mutual relations, will be void of plurality, and will just lead to unilateralist isolation. Furthermore, this is taking place within the framework of a process that we have to identify as something being governed by the supranational within the national as a “currently undergoing legal acculturation”.⁴⁰ Yet, this gives us the same sense of hope we have just referred to above, because it is easy to

³⁷ Cf., by the author, ‘Legal Traditions? In Search for Families and Cultures of Law’ in *Legal Theory / Teoría del derecho* Legal Positivism and Conceptual Analysis / Postivismo jurídico y análisis conceptual: Proceedings of the 22nd IVR World Congress Granada 2005, I, ed. José Juan Moreso (Stuttgart: Steiner 2007), pp. 181–193 [ARSP Beiheft 106] {& [as a national report presented at the World Congress of the Académie internationale de Droit comparé] in <<http://www2.law.uu.nl/priv/AIDC/PDF%20files/IA/IA%20-%20Hungary.pdf>> & *Acta Juridica Hungarica* 46 (2005) 3–4, pp. 177–197 & <<http://www.akademiai.com/content/f4q29175h0174r11/fulltext.pdf>>}.
³⁸ Roger Cotterrell ‘Images of Europe in Sociolegal Traditions’ [2005] in his *Living Law Studies in Legal and Social Theory* (Aldershot & Burlington Va.: Ashgate 2008), pp. 145–164 [Collected Essays in Law Series] on p. 159.
³⁹ Van Hoecke ‘European Legal Cultures...’ [note 36], p. 87.
⁴⁰ Antoine Garapon ‘French Legal Culture and the Shock of »Globalization«’ *Social & Legal Studies* 4 (1995) 4, pp. 493–506 at p. 493.

imagine that the series of national acculturations occurring due to the “shock of globalization” shall eventually feed back into the slow formation of the whole structure. In other words, these immensely elaborate complexes include certain hidden potentials of wiggle room and influence exerting mechanisms, which are hardly discoverable in advance, yet at the same time are capable of acting counter to the forecasted directions and already settled issues to a decisive degree.

In sum, culture is defined as a community pattern, a collective programming of minds. Legal culture, differentiated from mere uses and skills and attitudes, is also defined as a pattern of thinking (in construction and reconstruction continued) with a pre-selective force which, as part of the law’s genuine ontology, gets shaped by each and every of us within the given culture, even if majored mostly by legal professionals. Many objectifications notwithstanding, the European Union’s legal culture is deficient, reduced to surface manifestations, stimulated by mostly borrowed components. With a variety of available typifications within the Union, the issue can also be raised which of the national laws’ components are getting unified and what is to remain from participating national legal cultures if their organic unities are atomised as freely selectable elements.

4.2. Implementing a Grand-System Functioning

So what we may notice then is that all of our legal knowledge acquired so far has been rendered senseless, since it has been overwritten by the way European law has been functioning. So we now have a new order, which is developing as an *open system*. Certainly, there are given cornerstones, such as values, principles, and quite a lot of rules. Nevertheless, all of these are transformed into appreciable order, and more significantly, a system with foreseeable future developmental stages programmed in advance only by their actual contemporary interpretation. Still, none of the components constituting this functioning unit are capable of serving us as a point (or points) of departure—as axioms—when attempting to describe the general nature of the range of its systemic reach, its structure, future processes launched in its name, and normatively referenced correlations thereof. In essence, this is such⁴¹ that each and every element of it is natively

⁴¹ For the first, intuitive attempt at the deconstructive reconstruction of how the law is structured, see, by the author, ‘Structures in Legal Systems: Artificiality, Relativity, and Interdependency of Structuring Elements in a Practical (Hermeneutical) Context’ *Acta Juridica Hungarica* 43 (2002) 3–4, pp. 219–232 {& <<http://www.akademiai.com/content/>

contextualised and pre-positioned, that is, it in and of itself does not possess a definitive force, so it is only in some sort of flexible and transient (i.e., specifically actualised) conjunction with the others that it is capable of exhibiting definitive force. But its contextualisation and positioning are provided by its actual environment at any given time, that is, its openness toward the exterior, its strategic and tactical choices in taking on the challenges posed by the real world as its surroundings. In other words, internally it disciplines according to what is concurrent, because it deals with the questions to be answered within its relatively closed system, but mostly not in any way that would result in achieving any degree of authoritative certainty, that is, exclusivity or singularity without alternatives. It activates with the tools of forum, scope of power, and decision, with which it always closes off (reseals) its system within the realm of the here and now at any given time; however this then does not in and of itself become the root of the same or other forums, scopes of power, or decisions belonging to the consecutive phase, so the only real derivative is that the carriers of today's processes shall—theoretically and according to the notion of what is expectable—be founded on the previous system's state of systemic self-closure. This is because these cornerstones themselves are divergent: they are facing various different directions while carrying different potentials as well, that is, in and of themselves they are of significance, but they do not form a closed system, therefore its particular interpretation on any given day is always (in)formed by their continuous balancing based on unending updating.

Therefore we believe that envisioning any sort of counter-posed or perhaps antagonistic bipolar relation would be fundamentally off-target, it would precisely deny the basic idea of the European Union itself. The reason for this is that we do not see this as a case of the European entity facing off with all the national ones, rather the former is a central (directly and exclusively communal) forum existing along with those of the member states', and making decisions regarding their affairs (at least in an indirect way), while the latter are all European entities themselves. As it is being stated nowadays, the judges of national courts themselves are (or, in fact should be) obliged to conduct even their more intimate/internal affairs as Euro-

pean judges, in essence keeping in mind the principles governing a Europe that is becoming increasingly more integrated.⁴²

4.3. With Legal Pluralism?

Legal pluralism is the case especially of the European Union,⁴³ “when it contains inconsistent rules of recognition that cannot be legally resolved from within the system.”⁴⁴

In order to contain and set a final limit to the process of pluralisation that had been becoming increasingly arbitrary, the European Court of Justice has declared and has had it declared three times that it has primacy and supremacy. For, according to its founding charter, it “is entitled to definitively answer all questions of European law”⁴⁵ and, as concluded by the doctrine based on its own jurisprudence, “is entitled to determine what constitutes an issue of European law”⁴⁶ and “has supremacy over all conflicting rules of national law”⁴⁷—without all this being by far not yet sufficient to be in and of itself capable of guaranteeing that no overlapping and inconsistency occur.⁴⁸

This is exactly the root of the hope-filled desire that if we could somehow interpret the entire European legal system’s structure—and within it the ongoing dynamics created by omnipresent, unavoidable conflicts, and the *ad-hoc* system of providing the resolutions thereof—within the framework of the perspective of *limited pluralism*, then the end result could be a more controllable overall scenario. As the proposition forwarded suggests,

“the pluralist model provides a comprehensive framework within which these inconsistent claims can coexist. Provided that the practical conflict within this model remains potential, and actual disputes are avoided, this can provide a stable, even a long-lasting, form of settlement.”

⁴² *The European Court and National Courts Doctrine and Jurisprudence: Legal Change in its Social Context*, ed. Anne-Marie Slaughter, Alec Stone Sweet & Joseph Weiler (Oxford: Hart 1998) xli + 400 pp.

⁴³ See primarily La Torre ‘Legal Pluralism...’ [note 11], *passim*.

⁴⁴ N.W. Barber ‘Legal Pluralism and the European Union’ *European Law Journal* 12 (2006) 3, pp. 306–329 on p. 306.

⁴⁵ Quoted *idem*. p. 323, with reference to EC Art. 234 (ex Art. 177).

⁴⁶ C-314/85 *Foto-Frost v. Hauptzollamt Lübeck-Ost* (1987) ECR 4199.

⁴⁷ C-6/64 *Costa v. ENEL* (1964) ECR 585.

⁴⁸ Barber ‘Legal Pluralism...’ [note 44], p. 323.

By the force of this,

“It encourages the Court of Justice to interpret European law in a manner that will be palatable to national courts, and, at the same time, discourages national courts from blindly insisting on the primacy of national rules. In short, the competing supremacy claims may serve to create an atmosphere of cooperation between the courts, where each side has an incentive to strive to respect the position and tradition of the other.”⁴⁹

Well, we have every right to view—at first sight—these kinds of (and similar) attempts to find a solution as arising from a sense of paralysis, and characterise it as a valiant yet laughably Utopist; after all, it is a rather rare occurrence in history that a large structure would purposefully hinder its own process of attempting to reach what would otherwise be a state of perfection in relation to its desired rule of rationality, by incorporating structural components that create confusion and impede its own progress. But as soon as we take it for granted that the European Union—as it exists today—could only have been formed from its predecessor formations and the latter’s deformities in such a way that it created its unity from the *i n t e r - n a t i o n a l* and the *n a t i o n a l* (derived from the entities that are the member states) —where the former enjoys primacy, but the latter maintains the right of updating vis-à-vis itself—with only a limited number of guarantees used as the glue, then we are forced to apply a dose of reality and be grounded in our thinking. And this then is the confirmation of the fact that this is a machine that is far from being able to guarantee smooth operation; yet it is exactly due to the structure affording its inherent forces (which are at the same time of a centripetal and centrifugal nature) a large degree of free flow and play, that an uninterrupted dynamism is present, which advances or may advance the cause of the common Europe through the contemporaneous processes behind unity and diversity—that is, those of partial autonomies grouped under the umbrella of a single overriding dominion—and through the temporal chain of solutions dissolving conflicts arising from them.

But if this is so, then it follows from this that we pose the question: *c a n w e t r u l y c a l l p l u r a l i s m* what we are talking about here. If it is religious commandments or ethical rules, territorial customs, mercantile *ususes*, sets of professional expectations or self-regulations of associations

⁴⁹ *Idem.*, pp. 328 and 328–329.

that fall within the system of referential gravitational pull of law, then the right of pluralism to exist is truly legitimate, because it is independently existing and operational dynamic entities that find themselves on a common platform on an *ad-hoc* basis, and here it is indeed the law (the formal positing by the status of statehood) that happens to do the referencing; but that which is being referenced, nevertheless, is contributing / may contribute its own essence and criteriality—in an unchanged state. However, European legal order—as we saw earlier—has a certain multi-polar nature, whereby a few of the European Union’s institutions of “»mixed« authority”—in which “the power-sharing composition [...] does not [...], in practice, work in a clear way”⁵⁰—do in fact carry on with their legislative, executive, and judiciary tasks, but they will only be able to apply the end results thereof in a precarious structural position (addressing mostly the state institutions and citizens of the member states), where these *n a t i o n a l* state agencies on the one hand adopt these results in one way or another (or refuse to do so by the means of some technical manoeuvre), but on the other hand, subsequently the adoption of these *c o m m u n i t y* norms become target for challenge (based on the method of adoption or the shortcomings of the adopted norms) either by other state agencies or individual citizens (or some organised group formation thereof) in front of either the national courts of the same member state, or some community level forum. So, on the one hand then, the community-level entity has no true independent life, since its only task and *raison d’être* is the representation and management of the community interlinking the member states. On the other hand, all that is derived from all this member state officialdom is not simply a reflex or projection of the centrally posited, but inevitably creative weighing and adaptation as well, which among themselves (and especially within the sphere of these acts layered on top of each other), and in conjunction with interpretations by other member states, and naturally, also in light of the general community perspective, provide a fertile ground for a series of possible conflicts to occur.

Yet still, the legal order of the European Union has no other life than the *d y n a m i s m* inherent in this. And this then, including its tensions and resolutions, continuously results in both solutions and repeated accumula-

⁵⁰ Torma András ‘Közigazgatás – Európai Unió – európai közigazgatás’ [Public administration, European Union, European public administration] in *Facultas nascitur* 10 éves a jogász-képzés Miskolcon, szerk. Szabadfalvi József (Miskolc: Bíbor Kiadó 2001), pp. 493–526 at p. 522.

tion of conflicts within the institutional manifestation of what is, after all, a communal existence.

It is this complexity, and the slow and uncertain organic integration similar to the theoretical solution mentioned above (or more precisely: from the inherent order-out-of-chaos philosophy that is ultimately the hidden core here), that may be the reason why—until this day—it remains practically unmentioned that one of the European Court of Justice's prime function would be to foster the process of the European legal order becoming internally more coherent and functioning harmoniously, which task and the latter's completion, however, "remains under-theorized, [...] remained relatively unaffected by the rich legal-philosophical literature on adjudication".⁵¹

5. THEORETICAL MODEL OF THE OPERATION OF EUROPEAN LAW

5.1. *Multipolarity with Centripetality and Centrifugality*

The metaphor of the solar system as a sub-systemic part of the galaxy describes such a relational sphere of the masses inside—which are moving along their path amidst the relevant physical forces—that is derived from their mutually relative positioning during their continuous movement, and the organising principles and facts connected to energy, mass, and position (as basic attributes) of which are depicted by our human culture of the modern era through the laws of physics.⁵² The paths of these masses are at once centripetal and centrifugal—as they are at all times balanced—and are defined by interrelations derived from the given quantitative characteristics of the given positions. In the realm of sociality, with the metaphor applied to *ius commune*, we can see a different equation, where we have polyphony resulting from the centrifugal forces gradually forming national separations (started by towns, princes, etc.) within the monophony of a CHRISTian Europe, with these forces eventually overwhelming the counterbalancing

⁵¹ Gráinne de Búrca 'Introduction' in *The European Court of Justice* ed. Gráinne de Búrca & J. H. H. Weiler (Oxford: European University Institute Academy of European Law & Oxford University Press 2001), pp. 1–8 [Collected Courses of the Academy of European Law X/1], p. 3.

⁵² For the development of the history of relevant ideas, cf. Joseph Needham 'Human Law and the Laws of the Nature' [Hobhouse Lecture at the Bedford College in London, 1951] in his *The Grand Titration* (London: Allen & Unwin 1969), pp. 299–332 as well as—for a comprehensive overview—*Natural Law and Laws of Nature in Early Modern Europe* Jurisprudence, Theology, Moral and Natural Philosophy, ed. Lorraine Daston & Michael Stolleis (Farnham & Burlington, VT: Ashgate 2008) xii + 338 pp.

exerted by the centripetal nature of the culture justified by and justifying through the common tradition.

The legal reality of the European Union is derived from its *b i p o l a r* structure, because when its centrally posited rules are locally integrated into practice (which is defined by the sovereignty of the nation state), this is done under circumstances whereby (and while) even law posited autonomously by the sovereign nation state is subjugated to that posited by the European Union, since the former may not go against the latter due to the latter having direct force and validity (thusly primacy); and so we get what is a somewhat altered metaphor of the solar and planetary system. In this tailor-made metaphor we have a centrifugal aspect that is merely a reaction to the (f)act of having joined the process of European integration, that is, we see a process of divergence based on the fact that even though having to give up certain blocks of sovereignty is a well-known prerequisite of joining the European Union, nevertheless, the national interest now within the European framework is making attempts at a sort of *o p t i m a l* harm-reduction aimed at rendering the effects of partially lost sovereignty *m i n i m a l*. And in this case the centripetal force is represented not by the (canon law of) “Roman” tradition of the club of *C H R I S T I A N* nobility or any other common ideology, rather it is exerted by the *u n i n t e r r u p t e d* flow of texts composed in the row of working languages and background cultures.

It is exactly due to this *d i v i s i o n a l i s a t i o n* of *s o v e r e i g n t y*—as this sort of structuring is derived from a constitutional level, since its source is the treaty (treaties) establishing the Union—why the theoretical possibility of *d i s c r e p a n c y* is natively present in even the conceptualisation of this solution. It is rather rare that we see overt attempts at finding out just exactly how far the boundaries of discrepancy lay, how much farther the walls can be pushed outwards, and neither is it common that we see a player pronouncedly rejecting these—this being against the rules. But covertly the governments and judiciaries of member states do this all the time, in a way finding an outlet for their need to experience their national independence. This is primarily so, because their constitutions define these truly national institutions as genuine national agencies—a definition connected to the relation of the executive and the judiciary being of a subordinate nature to the legislative. Their legal status as well as the body of law to be applied by them is provided from the single source of the legislation working within the framework of statehood. Consequently, they have a centuries-old intimate relationship with their own national law, since this is their natural habitat. And since their professional activity is subordinated to

the legislative body of their own homeland, even such a scenario is possible where, in a borderline situation, his or her own case is actually rooting, so to speak, in opposition to his or her own law.

Yet they receive the body of European Union law as (well, let us say) a mere *extra task*, a sort of chore, which merely multiplies what is an already ample body of domestic sources of law. So they usually treat these similarly to how an English judge would treat statutory instruments when simply following the own tradition: with distrust, as a sort of hampering, almost an illegitimate meddling that should best be avoided. And if this external intrusion is unavoidable, then the judge shall respect it only to the extent that he or she absolutely has to.

So to summarise: although law-making and law-application in their polarised dichotomy manifest as an external obligation for the judge, still he or she treats and respects the domestic law as his or her own, because it *is* in fact his or hers. This is in contrast to the European law, which the judge only experiences as something arriving on his or her bench in a whimsical fashion from distant outside powers beyond his or her reach, and coming in forceful and unpredictable waves, with blatant disregard for their own level of integrability. While a judge is continuously contributing to the building of the body of law formulated by his or her legislator, because the judge feels that he or she is in fact part of the process of dogmatic refinement, rejuvenation based on actualisation, with the European law the judge is not very much exuberant about the possibility of contributing to progress—among other reasons, because his or her chance to contribute is at best limited, perhaps even practically nonexistent. Therefore his or her perspective remains that of the domestic law—regardless of what happens to be the premier background of his or her particular procedure.

In any case, the model of the legal order of the European Union has, so to speak, spread the process of “law-provision” over *different tiers*—with almost as much conscious determination as HANS Kelsen once had, when in 1922 he revised his original stand from before WWI on law-application and imputation/ascription as a mere consequence calculation and validation, by declaring that for the *Rechtserzeugungsprozess* to actually occur, there are at least two stages needed, since the actualised (i.e., case specific) application of the future-bound—and therefore general-abstract—posited can only take place in the context of the given specific.⁵³

⁵³ Cf., by the author, ‘Hans Kelsens Rechtsanwendungslehre: Entwicklung, Mehrdeutigkeiten, offene Probleme, Perspektiven’ *Archiv für Rechts- und Sozialphilosophie* LXXVI (1990) 3, pp. 348–366 and ‘Kelsen’s Theory of Law-application: Evolution, Ambiguities, Open Questions’ *Acta Juridica Hungarica* 36 (1994) 1–2, pp. 3–27.

5.2. *Order, Out of Chaos*

Until the 20th century practitioners of our social sciences (including our legal science) could hardly imagine that law or any somewhat objectified normativity could in fact be effective without a positivism that treated its subject with clear definition existing behind it—so without support being provided by such an assumption of an operational order being present, which would be able to provide the state judiciary, the professional discipline, the teaching church (etc.) with grounds allowing it to clearly translate into the language of practice—and enforce with its sanctioning mechanisms that which is posited by the given normative order. It presented its operation as being mechanised in its ideology: sort of a truly *ausdifferenziert* homogeneity (following NIKLAS LUHMANN's terminology of *Ausdifferenzierung*), thus lifting the procedures performed in the name of the above-mentioned entities above general everyday heterogeneity. So what did it do then? It lifted a conceptual order above the everyday, it has rendered itself reified, and in a somewhat alienated form it (relying on secret knowledge incomprehensible and enigmatic for the everyday person) promoted into the status of brutally unquestionable consistency and necessity that which appeared, with good reason, to the excluded layperson to be not only without convincing power, but also even an indecipherable and randomly cruel twist of fate.⁵⁴ In short: it chased chaos away in order to see order in its place. Because chaos and order are in this approach antinomies, and when faced with them, we either pick the one or the other.

It was with the arrival of 20th century sociology that we see the reformulation of the descriptive vision of society. The previous understanding of society as the conglomerate of man-made reified structures in self-propelled motion was replaced by a model that was not based on a one-way mechanicalness (as is the case with the definition above), rather, it was focusing on the spontaneous motion of concurring simultaneities, and on the continuously occurring social practice within them, on the statistical result of the motivational-battles of individuals, on interactions occurring in actuality. And surprisingly—although its descriptions of the micro were recording nothing but chaos (a continuous floating and state of in-between within the perpetuity of attractive and repulsive forces)—still, thanks to the develop-

⁵⁴ Cf., by the author, *Lectures on the Paradigms of Legal Thinking* (Budapest: Akadémiai Kiadó 1999) vii + 279 pp. [Philosophiae Iuris] and William A. Conklin *The Phenomenology of Modern Legal Discourse* The Judicial Production and the Disclosure of Suffering (Aldershot, etc.: Ashgate 1998) xii + 285 pp.

ment that in all of this it was, nevertheless, always and determinately searching exclusively for signs of order being created (including the details of how, along what avenues, principles, perspectives, and with what chance of success), in its descriptions of the macro it could arrive at the logical conclusion of the potential for and fact of order out of chaos, that is, one originating from, borne out and derived from chaos.

And it is important to note here that the theoretical notion of macro-order originating and eventually manifesting from micro-chaos is what laid the foundation of the general perspective of modern economics; modern sociology is also rooted in this perspective; and this is the theorematic fundament eventually settled on by the deconstructionist aspect of today's jurisprudence, and this latter—incidentally—is a branch of scholarship with much older theoretical foundations and developmental span than the former ones.⁵⁵

Today's social analysts call our attention to the fact that according to the "normativist model" of the early 20th century—from ÉMILE DURKHEIM to TALCOTT PARSONS—"society after society was depicted primarily in terms of the consistency, regularity, and continuity of its system of rules and of the power of these rules to bring about behavioral conformity".⁵⁶ It was only later that the recognition has been formulated according to which

"The essence of human life did not lie in following rules and in being rewarded by one's virtue but in making the best use of rules for one's own self-interest, depending on the situation".

From this time on, social theories are changed in that

"rules are seen as ambiguous, flexible, contradictory, and inconsistent; [...] they serve as resources for human strategies, strategies that vary from person to person and from situation to situation... Order is never complete and never can be".⁵⁷

Well, this has the realisation serving as its foundation deeply rooted in social theory, according to which we have absolutely no criteria available to us for

⁵⁵ Cf., by the author, *Theory of the Judicial Process The Establishment of Facts* (Budapest: Akadémiai Kiadó 1995) vii + 249 pp.

⁵⁶ Noel B. Reynolds 'Rule of Law in Legal and Economic Theory' in *Law at the Turn of the Twentieth Century* International Conference Thessaloniki 1993, ed. L. E. Kotsiris (Thessaloniki: Sakkoulas 1994), pp. 357–376 on p. 373.

⁵⁷ Robert B. Edgerton *Rules, Exceptions, and Social Order* (Berkeley: University of California Press 1985) ix + 328 pp., at pp. 13 and 14.

providing proof of “differentiating at an ontological level” among the various branches of social sciences. Jurisprudence too is comfortably floating on being propelled by its concept of normativity (the force of normative enactments, and so on), while it has absolutely no social scientific affirmation that it could point to for support.⁵⁸ And this may result in cynical, apparently relativising attitudes—with the dry constataion, for instance, that

“the making of rules and social and symbolic order is a human industry matched only by the manipulation, circumvention, remaking, replacing and unmaking of rules and symbols in which people seem almost equally engaged”⁵⁹

—, unless we are cognisant of the fact that this description originates from the classic author of cultural anthropology: relying on a diagnosis of standard human behaviour exactly so that she could somehow be enabled to demonstrate the nature of the eventual order rising out of the chaotic nature thereof.

Well, it is as if early on the deconstructionism of legal science seemed to have dethroned the professional tenet of legal positivism, voiding it with critique that was exposing it for what it was and irreversibly (destructively) overwriting it. In the long run, however, this seems to have produced the result of the previous static vision of order—whereby everything is rendered reified with mechanical simplicity—being replaced by the potential for order being described as a process, through / understood as / traced back to the attribute of the ceaseless dynamism of fluctuating motion. In terms of the methodology of fermenting this train of thought, it was perhaps LUDWIG WITTGENSTEIN, then on the one hand, the speech-act theory (as the consequence of the auto-transubstantiation of the positivist philosophy of science), and on the other hand, the cognitive sciences that played the most decisive role in contributing. As a new systemic concept this could then become the point of departure for imagining a self-organised entity that would be constructed through autopoiesis—that is, through a process whereby the systemic end-result features solid

⁵⁸ Niklas Luhmann *A Sociological Theory of Law* trans. Martin Albrow & Elizabeth King-Utz (London: Routledge & Kegan Paul 1985) xiii + 421 pp. [International Library of Sociology], p. 13, noting on p. 20 that “Until today there is not a single notable beginning to a sociological theory of the positivity of law.”

⁵⁹ Sally Falk Moore *Law as Process An Anthropological Approach* (London & Boston: Routledge & Kegan Paul 1978), vi + 270 pp. at p. 1.

and confident self-identity, despite its internal governing principles having been formed along the way through a variable and protracted process. It was the English–American movement of Critical Legal Studies⁶⁰—which, functioning perhaps as an *agent provocateur*, was questioning the underlying ideology and offering new methodology at the same time—that reshaped the landscape most effectively and to the most radical extent, yet the final conclusions were drawn (concurrently, and in terms of partial result perhaps even ahead of it) by a new legal ontology.⁶¹

The reason for this was that the latter could raise the level of discourse onto a higher level in terms of social scientific significance, as it managed to place both the external ideological criticism (which, based on an epistemological approach, was attacking from a counter-position and aiming at revealing hidden weaknesses) and the criticism of the methodology applied by lawyers when establishing their visions of the world inside the process-description of the actual operation of law, thusly it could analyse the components discovered therein as true ontological entities. Since it characterised the overall social complex as it exists at any given time as it is measured by the status of self-affirmative exertion (at any given time) manifesting in the interaction of partial-complexes of natively relative autonomy that eventually form some sort of final (tendential) unity resting on an identifiable trend. And hidden inside of this we have—even as far as the operation of law is concerned—what is an obligatory prerequisite for today’s economy-centred mainstream materialism: the conflict of interests embedded in the collision of different manifestations of legal formalism, and in those scenarios where abstract positive legal rules are applied in specific cases conjuring discrepancies in

⁶⁰ Cf. <http://en.wikipedia.org/wiki/Critical_legal_studies>.

⁶¹ Cf., by the author, ‘Towards the Ontological Foundation of Law (Some Theses on the Basis of Lukács’ Ontology)’ *Rivista Internazionale di Filosofia del Diritto* [Roma] LX (1983) 1, pp. 127–142 {& in *Filosofía del Derecho y Problemas de Filosofía Social* X, coord. José Luis Curiel B. (México: Universidad Nacional Autónoma de México 1984), pp. 203–216 [Instituto de Investigaciones Jurídicas, Serie G, Estudios doctrinales, 81] & <<http://www.bibliojuridica.org/libros/3/1051/20.pdf>>} as well as—in a systematic treatment—his *The Place of Law in Lukács’ World Concept* (Budapest: Akadémiai Kiadó 1985; 1991) 193 pp., particularly Part Two, pp. 69 et seq. For a present-day summary, cf., also by him, ‘Contemporaneity of Lukács’ Idea to Modern Social Theoretical Thought (The *Ontology of Social Being* in Social Science Reconstructions – with Regards to Constructs like Law)’ [a closing lecture at the *III Seminário Internacional Teoria Política do Socialismo on Lukacs e a emancipação humana* organised by the Universidad Estadual Paulista, Faculdade de filosofia e ciências (Marília, Brasil), 17–21 August 2009].

practical implementation. Nonetheless, it is exactly the legally constructed formulation of conflict-resolution and conflict-settlement within the legal professional methodology's process-reconstructions that fill the gap between—on the one hand—the lack of a truly unbroken chain of logic, and—on the other hand—the specifically unique nature of an adjudication situation (in which the adjudicator fills an irrevocably personal role of a constitutive character with an irrevocable and non-transferable personal responsibility attached to adjudicator's participation).

In all of this we can find the explanation (in terms of the legal organisation of the European Union) for which we have introduced the *b i p o l a r* structure comprised of—on the one hand—the production and releasing of law by the European Union as a supranational entity and—on the other hand—the reception and conversion thereof by the member states, moreover—and thirdly—the *s i m u l t a n e i t y o f r a n d o m l y c o l o u r f u l m o t i o n* propelled by centripetal and centrifugal forces, which nonetheless has the net result of creating order with its overall cohesive critical mass. So which of these forces is of a *c r e a t i v e* nature in this precariously balanced (balancing) structure? Well, according to the above, these are, on the one hand, the explicit legislative activity of the whole of the representative institutions of the European Union, and that of its agencies empowered to produce and put law into force (manifesting in the power to enter treaties, release directives, and produce court rulings), as well as its tacit legislation (which demands recognition under the aegis of *acquis communautaire*), and, on the other hand, the reception given to all of these by the member states at their organisational-institutional levels (e.g., how they carry their validity into further spheres, how they adapt and implement them). And the *f i n a l p r o d u c t* of all of this is no other than something nobody has attempted to describe thus far, although this could be a sort of a The State of the Law of the European Union similar to what is recurring practice of the State of the Union in the United States.⁶²

As we know from GEORGE LUKÁCS' gigantic socio-ontological undertaking,⁶³ man's conscious identifications of aims always tend to get realised dif-

⁶² Cf., e.g., <http://en.wikipedia.org/wiki/State_of_the_Union_address>.

⁶³ By George Lukács, *The Ontology of Social Being* Hegel's False and his Genuine Ontology, trans. David Fernbach (London: Merlin Press 1978) 117 pp., Marx's Basic Ontological Principles, trans. David Fernbach (London: Merlin Press 1978 [reprint: 1982]) 173 pp., and Labour, trans. David Fernbach (London: Merlin Press 1980) v + 139 pp., as well as Prolegomena, I–II, hrsg. Frank Benseler (Darmstadt: Luchterhand 1984–1986) 692 + 747 pp. [Georg Lukács Werke 13–14].

ferently from the original target, as they end up being either relatively more or less, or they may simply get realised as something entirely different. And as we know also from him: this is not merely a sign of divergency, a margin for error, a human failure, a lack of a valiant effort, or perhaps that of futility, rather a fundamental fact of socio-ontology, and as such, it is the starting point of any praxis-philosophy understood as a system of social theory capable of providing/venturing to seek an actual description of practice. So the order that—*in concerto*—happens to be produced out of all of this, is exactly whatever could possibly evolve at all as the result of the free-flowing and fixed forces active in the system. Observing it at any given time, its corresponding state is then such a characteristic, in the framework, on the ground, and from the origin of which—exactly as just-so-being [*Gerade-so-Sein*] in the exclusive ontological actuality—all subsequent movements are taking place.

It is strange for us to recall today about ENGELS—who attempted to apply HEGEL's methodological notions to the philosophy of science of his times—just how much his multifaceted concept of dialectics (which, despite its dogmas and certain erroneous components, included at least the potential for some sense of openness in terms of prospect) rigidified, and subsequently became the scene of brutally irrefutable and inexorable (perhaps best described as automatically predestined) social processes in the Soviet version of MARXISM, as a materialistic theology of a kind of order, which possesses such a sense of superiority, perfection, and completeness (derived from having been successfully finalised), which is equal in measure exactly to the degree it is free of contradiction at any given time. It also brings a smile to our face when we recall that it could have actually been the diletantism of the Chinese Socialist dictator, MAO TSE-TUNG,⁶⁴ when it came to his dabbling in philosophy (which incidentally also relied on elements of Eastern wisdom), that may have opened the eyes of the then already Sovietised Central and Eastern European region to the notion that to rebut, that is, c o n t r a d i c t i o n , is no antonym of order. It is not anarchy, not rebellion, not counterrevolution; thusly it is neither a matter of state security. Because it is in fact not a sign of rejection (through statements), rather it is a natural sign of life, as such is the true lifestyle of any organism that is in fact actually functioning; or to use LUKÁCS-speak once again: it is the phenomenal form of the quality that anything that *can* operate is performing its

⁶⁴ Mao Tse-tung *On Contradiction* (Peking: Foreign Language Press 1952) 71 pp. {& *On Practice and Contradiction* introd. Slavoj Žižek (London & New York: Verso 2007) 199 pp.}.

operation along the aforementioned line, this being a fundamental fact of existence, opposite to which there can be nothing but the denial of life (i.e., motionlessness or death).

So tension, conflict, or the fact that resolutions of issues are reached via difficult processes at any given time are not signs of dysfunction, rather these are the functionality of any truly operational system. No manifestation of a lack of order, rather it is exactly the unavoidable prerequisite for and the way of the reconstruction/reaffirmation of order (theoretically always at a higher level), which is a naturally occurring and necessary process from time-to-time, as order has to be able to provide answers to the challenges facing it and has to withstand when practical (compromise) solutions are reached at any given time, with storms of expectations as well.

5.3. Practical Continuum in a Standing Flux

It is this kind of kinetic-dynamism into which we have integrated the structuring solution for the problem that a serious portion of the European Union's legal manifestations are of a soft, rather than a hard nature, that is, this law can hardly be interpreted within the static framework of formalism containing such plain polarities as obligatory / not obligatory, can be applied / cannot be applied, or valid / not valid. So all of this presents us a flexible image (i.e., a kind actually not binding through its formal character) of law (allowing for ever-changing conclusions being drawn from case to case, based on the various interpretations of cases and standards dependent on context or the criterion of what is purposeful), which is an exact denial of both the classic legal positivism characteristic of our Continental yesteryears as well as that of our Socialist European yesterday,⁶⁵ since it

⁶⁵ It is to be noted that the kind of regulation known as *Aufgabe-Normen* [task-norms] in the East-German regime that used law as an effective means of organisation was all through criticised by the official Soviet and satellite legal policy and scholarship alike, because it set (of course) objectives without defining pre-/pro-scription and sanction. According to the textbook treatment by [Akademie für Staats- und Rechtswissenschaft der DDR, Potsdam-Babelsberg] *Verwaltungsrecht* Lehrbuch (Berlin: Staatsverlag 1979) 686 pp. on p. 228, „Aufgabenstellende Entscheidungen enthalten — im Unterschied zu den normativen Entscheidungen — keine Verhaltensregeln, sondern setzen Ziele und stellen Aufgaben, die die sozialistische Gesellschaft insgesamt oder in diesem oder jenem Zweig bzw. Bereich oder Territorium innerhalb eines längeren oder kürzeren Zeitraums erreichen bzw. lösen will.“ Cf., e.g., Paul Friedrich, Traute Schönrath, Walter Schönrath & Ingo Wagner ‘Zur Frage der »Aufgabennormen« im sozialistischen Recht’ in *Wissenschaftliche Zeitschrift der Karl-Marx-Universität Leipzig* Gesellschafts- und sprachwissenschaftliche Reihe, 1965 Sonderband: *Staatliche-rechtliche Probleme der Volkswirtschaftsleitung*, pp. 15–32.

overwrites the possibility of imagining a law of “a purely domestic character”.⁶⁶ Because what it offers instead is merely c o n t i n u u m .⁶⁷ This is that we can discover today through ontological reconstruction as a final truth behind the formalism and the disciplinary restrictions of the kinetic processes of law.⁶⁸ Our supplementary factor here is, however, that those classic form-structures that have been relied on by the individual nations have by now mostly been weakened by having been integrated into the legal order of the European Union; and the professional deontology implied as its own recommends a kind of concentration (which is deconstructive in the formal sense, as it is destroying even the remaining legal homogeneity) on expressly substantial (i.e., one merely referred by the legal normative expression, but not contained therein, thus heterogeneous) contents.

In addition to the continuous presence of and reliance on the t e l e o - l o g i c a l , the other element that has also been serving as the foundation of this was the juridical formulation of the doctrine of “direct application”⁶⁹ and “indirect effect”⁷⁰ as early as a quarter of a century ago. However, characteristically of the professionally formulated obscure speech of the European Union, this burst into the legal order thereof in such a way, that it, on the one hand, has left it unclear to this day exactly what, when, and under what circumstances (i.e., in the presence of what fulfilled conditions) can the centrally posited overwrite that by the national legislation; and, on the other hand, it continued to maintain the national legal orders on the polar opposite side, while leaving the task to the national side to adapt or exchange the nationally posited for anything originating from the community;

⁶⁶ Klaus P. Berger ‘The Harmonisation of European Contract Law: The Influence of Comparative Law’ *International and Comparative Law Quarterly* 50 (2001) 4, pp. 877–900 at p. 887.

⁶⁷ Zdenik Kühn ‘The Application of European Law in the New Member States: Several (Early) Predictions’ *German Law Journal* 6 (2005) 3 in <http://www.germanlawjournal.com/pdf/Vol06No03/PDF_Vol_06_No_03563-582_Articles_Kuhn.pdf>, pp. 563–582 at p. 579.

⁶⁸ Cf., by the author, ‘On the Socially Determined Nature of Legal Reasoning’ *Logique et Analyse* [Leuven] (1973), Nos. 61–62, pp. 21–78 {& in *Études de logique juridique* V, publ. Ch[aim] Perelman (Bruxelles: Établissements Émile Bruylant 1973), pp. 21–78 [Travaux de Centre National de Recherches de Logique]}, as well as *Theory of the Judicial Process* [note 55] and *Lectures on the Paradigms of Legal Thinking* [note 54].

⁶⁹ “The validity of a Community measure or its effect within a Member State cannot be effected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of a national constitutional structure.” C-11/70 *Internationale Handelsgesellschaft* (1970) ECR 1125, 3.

⁷⁰ C-14/83 *Von Colson v. Land Nordrhein-Westfalen* (1984) ECR I-1891.

a process that has thusly continued to be based on domestic application, that is, on the discretion of local contemplation and interpretation. Since no other conclusion could indeed be drawn than the one according to which

“the Member States’ obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the Courts. It follows that, in applying national law, whether the provisions in question were adopted before or after the directive, the national Court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter.”⁷¹

It is easy for us to see that it was the entire legal perspective of the European Union which was turned into a pragmatic-instrumentality instead of the primacy of any legal dogmatism in this way, being true to its ever more openly acknowledged mobilising function, rather than being true to its regulatory function in the classic narrow sense.⁷²

It is well known that in the large structure itself, which is being built during the process of operation, beyond the directives influencing only certain limited areas, it is undoubtedly the court rulings (which also take on the task of securing the entire legal order and constitutionality) that set the milestones; with a huge number of consequential results that often set even the vision of the role of the community courts on new paths, and these results can occasionally be more dramatic than even the founding treaties concluded with the utmost formality. Consequentially in this process, as a result of the liberating effect of these factors, the authors of the European law continue down the slippery slope and tend to keep upping the ante by proposing ever-bolder ideas, thereby further eroding this formlessness. They draw legal conclusion from trends and facts of institutional developments, while the only framework provided for any of this kind of activity (regarding the role of the judiciary, the alleged dissolution of any formal-doctrinal discipline, the ultimate ideal of the pragmatic ambition capa-

⁷¹ C-106/89 *Marleasing SA v. La Comercial Internacional de Alimentación SA* (1990) ECR I-4135, 8 (with reference to the case of *Von Colson* quoted above).

⁷² For their antagonism in conflict periods or in succession, cf., as a case-study by the author, ‘Lenin and Revolutionary Law-making’ *International Review of Contemporary Law* [Brussels] 1982/1, pp. 47–59.

ble of penetrating just about anything) is the overgeneralisation of other authors. Moreover, it is as if nobody was bothered by the fact that (whether it be a community act, or the generalisations of a free-floating intellect that we are talking about) even the bare minimum of what was regarded as a *sine qua non* even in the Socialist doctrine is absent: laying the foundation of whatever is the target of their eventual intervention with first doing preparatory work, case-studies and debates on cost/benefit analysis, and with the identification and affixing of the actual cornerstones.⁷³ Yet they keep skipping these steps, since we can only find a limited number of pointers about the underlying basic issue whether a precedent-type law is in fact alive or is in the process of development inside the womb of the European Union (and if so, then which type and *sui generis* version of it); these pointers being certain judicial decisions of unclear status themselves, which are not overtly identified as possessing the quality of precedent, and where this quality is only identified a personal interpretation of the author, based on self-referential clues, or on consequences drawn from other clues. But if all that intuitive reconstruction can decipher out of any such signal is that—along certain fundamental material values and procedural principles, and with the insertion of certain forums—it is the efficiency of reaching a target that is of premier importance, then we have indeed returned to reliving⁷⁴ the excitement-filled historical time of the “revolutionary honeymoon period”.⁷⁵ Since this means that the state of things is such that the main area of action is the mobilisation for self-propelled social activity and the encouragement of autocatalytic processes (akin to grassroots initiatives), in an atmosphere where each player is stopping the building of new boundaries at their own doorstep; a building process that, incidentally, is continuously breaking down the previously demarcated ones.

Consequently, these kinds of complex movements, including divergent motions, discernible in the legal reality of the European Union, simply rep-

⁷³ E.g., the Act XI (1987) of the Hungarian People's Republic on Law-making.

⁷⁴ Within the scope of his own research, cf., by the author, ‘Lenin and Revolutionary Law-making’ [note 72] and—regarding its variation during the Chinese “cultural revolution”—*Codification...* [note 24], especially pp. 239–242, as well as—in view of our subject here—‘Jogi kultúránk – európai és globális távlatban’ [Our legal culture in a European and global perspective] in *Európai jog és jogfilozófia* Tanulmányok az európai integráció ötvenedik évfordulójának ünnepére, szerk. Paksy Máté (Budapest: Szent István Társulat 2008), pp. 13–42 [Jogfilozófiák] {reprint in Varga *Jogrendszer, jogi gondolkodásmódok...* [note 35], ch. I}.

⁷⁵ For its first description, see Pitirim A[leksandrovich] Sorokin *The Sociology of Revolution* (Philadelphia & London: J. B. Lippincott Company 1925) xii + 428 pp. [Lippincott Sociological Series].

resent a certain state, that of being alive, and, moreover, as a necessary actualised form and consequence of its consciously designed multipolarity. Naturally, from an analytical perspective, ultimately it is not the presence of these factors that is of interest, rather it is the longitudinal tracking and observation of whether or not the totality of these motions exhibits the character of a singular trend when evaluated at the end of their respective time period, and if such uniform (tendential) trend is in fact identifiable, then what is the nature thereof. In other words, how does the end result likely to manifest measure up against the one that had been ideally expected at the outset; is there a need for intervention to correct the course, that is, is it called for that the future course of these be reset with the tools at hand, and if so, then, in what direction.

It also follows from the above that it can only be considered wishful and rather simplified ideological thinking (bordering on the Utopian), based on which the statement could be made that, based on what is undoubtedly a level of integration getting higher by the day, both the European Union and its law shall eventually reach a uniform or unified state, so to speak. Because this would not result in the coming of some *End of History*⁷⁶—so that an eschatological synthesis could then bless our everyday reality—, since never in history have we actually witnessed, as a socio-ontological reality, humankind reaching a final state of rest longed for in the form of a transcendental final arrival. So whatever is taking place now is actually not a process eventually terminating in a final uniformity, not convergence, not a final resolution, and neither is it an ultimate coming together of all the contributors in a projected future Golden Age at the end of a single path. Instead, we should likely say that in the current structure of the European Union the discrete parts (existing at any given time) preserve their state of *s t a n d - i n g a p a r t* while and via being diverging *c o m p o n e n t s o f p a r t i a l u n i t s* constantly restated/reaffirmed at ever higher levels. Accordingly, the discrepancies necessarily regenerated at any given time are not so much contradictions based on the denial of something, rather they are variations forming with a relative independence on top of a principal thesis that is merely implicitly expressed (because these variations—just as in the repetitious fugal structure—express the main theme in their fragmentary quality).

⁷⁶ Francis Fukuyama *The End of History and the Last Man* (New York: The Free Press 1992) xxiii + 418 pp.

5.4. *Activated by Nations*

However, at the same time, several further consequences result from the recognition of the above. Since in this sort of complex kinetic scenario only what gets actually realised in practice is effectuated and enforced.

Yet, it is important for us to see here that whatever we identified as bipolarity in the way the European Union's legal system is structured, carries relevance exclusively from the perspective of legal imputation/ascription, referencing, and (validity-)enforcing; but it has no real existence in terms of the sociological, and neither does it have an independent existence discernible from a disciplinary perspective of the theory of power/officialdom. Since just as in the League of Nations or in the United Nations, it is the aggregate of the constitutive member states that is the actor in acting in the name and through the institutional system of the given international entity (showing that multiplicity had by then been transformed into a common will), this has been observed as happening the same way in the history of the evolution of the European community thus far. While whatever is produced as European law in the regulatory or adjudicatory institutions of Brussels, Strasbourg or Luxembourg provides the foundation for a legally independent source of validity, one that, nevertheless, has no existence without the constitutive states. Not only because (legally) there would be no entity on the receiving end, but also because whatever even actually does appear as European law could not (sociologically) be forged without them. It is merely as consequence of the series of its establishing treaties that we can even talk about the existence of the European Union, of its institutional system, of citizenship expressing inclusion therein, and of anything else. While the operative character of the nation state is a sociological reality, the European communal conglomeration of national operations is just a *l e g a l d e r i v a t i o n a n d r e f e r e n c e*, a normatively treated conceptual web, in which the only additional reality is represented by the presence of conformity (the bare fact that conduct is in functional correlation with the posited), and behind it, it is the ideology of being European that represents an additional psyche, which can be described as prevailing (since it lands itself to being described as operational). While the Union's administration, its activity as a unit is just the *t r e a t y - b a s e d p r o j e c t i o n* of a given grouping of *n a t i o n a l e n t i t i e s*, however, lacking anything that was not already present in the composing national frameworks. We have all contributed to the construction of its buildings, it was us who recruited its functionaries, we continue to provide its funding. It, thusly, has nothing beyond what is ours. Its projections too are just whatever we ourselves have

transferred to it via empowerment provided by our association. So it is the wholeness as a relative total manifested in them, each and every consent and fulfilled desire, in a peculiar transformed state, once the compromises reached as a result of cooperation allow it. And this is so even if, as result of the neophyte attraction of our time we can now locate a growing number of individuals in Brussels, in Strasbourg or in Luxembourg, as well as in international law offices who—due to having been artificially programmed or because of a personal conviction—are loyal or attached to no nation, but to the entity that generates they themselves: the European Union. Their individual-psyche, however, is no ontological category until such a functioning psyche does not manifest as a force exerting palpable influence on our social existence, that is, until it does not appear as an independent social factor.

However, the ontological significance and practical exclusivity of the member state status grants a practically exclusive significance to the only possible forms, intensity and effectiveness of national *participatio*, that is, the optimality measured against the given nation's wiggle room in the framework of all players.

Consequently, all nations have to plan their path with conscious preparatory groundwork, including the forms and methods they wish to rely on when attempting to influence community life, while taking into account all that has already transpired in terms of strategies and tactics applied successfully/unsuccessfully within the dynamics of the total structure, and also regarding theoretical and procedural methods, value and interest related trends, and ways of national adaptation and implementation; doing all this by way of conducting prudent comparative studies (applying criteria such as whether or not the particular instance under scrutiny was a singular or historically proven solution, while also paying attention to identifying what are and are not the established notions of nationhood and tradition in the European sphere of argumentation). Naturally, as a feature of *n a t i o n a l p a r t i c i p a t i o n*, member states represent themselves in the European Union based in part on their successive governments, and in part by their representation in the European Parliament, the nature of which in any given term is also determined, although indirectly, by the political makeup of their national legislative body. And regardless of how deep the domestic political divisions may be in this respect, these two national sides obviously must—using a term borrowed from LUKÁCS once again—manifest in a tendential (as in governed by a common trend) unity, otherwise it is inevitable that the common national interest will suffer as result of their pugnacious and narrow-minded approach missing the big picture.

And this sheds a particularly important light on the phenomenon we tend to refer to as *phase-lag* in our own Central and Eastern European legal universe as an inherited piece of reality surviving from the Socialist political system, which we have been forced to endure. In particular, this means that since WWII we have not been able to get to know directly, and consequently have not been able to familiarise ourselves with, and master the connected practical skills related to, certain significant developments that have occurred in Western European and Atlantic law, as well as in the legal implementation of natively (directly) societal considerations (such as the use of referring to natural law by taking into consideration “the nature of things”; the argumentation and persuasion resting on principles and stipulated clauses; the speech in terms of human rights and with the constitutionalisation of issues; and the open contest of values that are to be safeguarded (based on weighing the one against the other); similarly to how have been left out of the changes that have occurred in terms of how the juridical function has evolved from being a mere dispenser of official pronouncements to being the venue and tool of resolving multiplayer societal problems.⁷⁷

And the inexorable conclusion arising from this is that from the trichotomous typology of premodern and modern followed by postmodern outlined earlier, the potential carried by the latter, i.e., the *postmodernism’s instrumentality*, has essentially remained unused in the juridical practice of formerly Socialist Central and Eastern European member states. Consequently, our room for play has been limited to however much is afforded by modernity, which obviously results in our relative uncompetitiveness, which is a sort of innate handicap on the common European legal marketplace. So until such time that we will have reached a state of complete equality of methodology, we shall continue to be the cause of the limited nature of our own effectiveness and curtail the protection of our national interest, or we can be the (indirect) cause of these efforts being limited (or perhaps even practically defeated) by exterior forces.

6. CONCLUSIONS FOR THE EUROPEAN LAW AS PRACTICED

6.1. *The Ethos of the Tasks*

If, and to the extent, our strategy followed so far has been determined by *unconditional integration*—as if the lack of such total inte-

⁷⁷ For these new forms, ways and paths, cf., by the author, ‘Meeting Points...’ [note 13].

gration would prevent us from enjoying the desired benefits of our new member state status—then (after the initial years of “junior” membership spent rehearsing our new role) we will inevitably have to supplement this view and bring it to a more sophisticated state, and then we have to organically reintegrate it into this new totality, by way of doing prudent work in particularly significant areas, such as the channels, procedures, methods and routines of protecting national interests. Above all, we would be well advised to get proficient at the new culture of sensibility, the command of which frees us from the tie of what is otherwise an unavoidable necessity of the legally consequential, and whereby, instead of a straight subordination, we could also engage in a practical dialogue therewith, and thusly maximise its potential advantages, and, at the same time, minimise certain of its aspects that may *hic et nunc* appear disadvantageous for us, or in the best case scenario, whereby we could turn it into the source of newly discovered advantages (using it as a sort of *anabasis*, as in the Greek dramas).

Because behind all that, in general, we find the internal intellectual struggle of the European legal thinking of our time—namely, for example: the dilemma, significance and stake, and even the sheer likelihood of convergence of the Continental and the Anglo-Saxon approach to legal regulation; the interrelation of the national-domestic and the intra-European international; the details of (voluntary and involuntary forms of) legal harmonisation and the chance for common codification; the contest of the various national heritages and their respective fixed “styles” both in common juridical work and in the creation of a new legal tradition; and also the way in which a *par excellence* independent and genuinely European legal scholarship can develop; and finally, based on which the designing of the internal structure and the generation of the substance of a European legal education has been occurring (along the line of the equivalency criteria)⁷⁸—manifested in an (internal) contest, which—although occurring hidden in the shadow of the abstract regime of academic jurisprudence—is, in a final evaluation, a field of competitive struggle. Yet, we would be well-advised to be cognisant of the fact that, even on the marketplace of doctrines, it is not merely the ideas themselves that are on offer; the issue of whether or not they are destined to eventually become widely recognised and accepted as consensual concepts is dependent on their overall depth (sophistication of

⁷⁸ Exactly such topics are treated by the author’s *Jogrendszerek, jogi gondolkodásmódok...* [note 35], *passim*.

their background), which is obviously a feature of exclusive privilege, afforded only to those national entities that have larger and more robust scientific institutions, and also, behind this, on the power of the familiar, the habitual, and also that of (special) interest covertly/indirectly reinforcing these longitudinal constants almost unnoticeably generating a sensation of comfort, as the foundational discussions themselves are also “for the most part, firmly based in national and local contexts”.⁷⁹

6.2. For Reaching an Own Future, Thanks to Own Efforts

Because, as we could see, the European colossus currently referred to as the Union is being building in the hope of putting the enormous energy potential of our continent to use, in what appears to be an unprecedentedly liberated new European intellectual sphere, which has been ridded, so to speak, of historical and national restrictions. So the key players continue to be the still fallible historical particularities, since it is not spiritual ideals leading the way, rather we are still guided by the same old familiar actors, namely statehoods which have previously ended up fighting (by choice) or having to fight (due to the external will of other forces) many wars in the name of protecting their individual interests during their millennia of common history. Consequently, their separate interests even now continue to be identified in their own self, regardless of the fact that now these happen to be wrapped (sublimated) in the encapsulation format designated by the community life identified as the “European Union”. What used to be a bloody conventional physical battle fought with arms has by now reached—at least in its appearances, on the surface—the more (post)modern, currently acceptable form of democratic participation, while the whole dynamics have, not surprisingly, remained unchanged, and it is still a battle of interests that is the immediate context of this reality.

These interests are largely national. Yet now these can be neutralised, altered, or rebalanced/reconstituted by local and regional (including, in the case of neighbouring states, also cross-border regional) interests, which, from time to time, are even capable of circumventing/substituting/overtaking that which would otherwise not have appropriate form if attempted to be formulated from (within) the regular framework of nationhood. Beyond the tipping point, these traditionally structured interests (characterised as partial, fragmented, or particular) can easily find themselves on the polar

⁷⁹ Cotterrell ‘Images of Europe...’ [note 38], p. 158 in re of debates on European constitution making, remarking that no genuinely ‘European’ opinion could be heard then.

opposite of the critical mass of these newly constituted gravitational centres; and these characteristically global-economic trends of cosmopolitan pervasion focused on global empire-building aspirations and the amassing of wealth, which by now have occupied a position antithetical to the once Westphalian achievement, and propose a future for Europe that is going to surpass the notion of nation-statehood (as a way of existence defined as the one distinguished from the inter-nationalist way)—doing all this under the pretext of advancing integration, but also (and in reality) under the spell of a bureaucratic (decision-making) powerhouse of a superpower, envisioning a comfortably conducive environment for the effective control of preferred market positions; doing all of this on a heap of rubble that had in its previous state been the democratic ideal (now rendered the democratic deficit), and the social concern that had once upon a time also been a basic promise, and as such, potential of the envisaged Europe.

Legal cultures are standing side-by-side in this complex. In legal terms, nation by nation they are all—individually—equal as member states, yet their chance of survival (i.e., their potential for either gaining further strength or losing significance altogether) in a historical sense, is measured by their ability to exert influence based on their innovating power.⁸⁰ Whatever academic pathos surrounds the guesswork involved in attempting to size up the chance of European continental Civil Law and Anglo-Saxon Common Law traditions eventually fusing or continuing to exist side-by-side, the prospect of convergence, obviously, shall not be determined by its internal factors, rather it will be the net result of the individual abilities for survival, the outcome of the battle of competing intellects pitched against each other. The preparatory work of the harmonisation and codification of European common law is registered by its cultivators everywhere as academic research, in abstract vehicles, under the aegis of the principle of the universality-concept of science; while and at the same time we must also recognise that these processes occur in reality as vehicles of the direct application of legal methodologies, skills and usages, and value systems native to national background cultures, that is, as inherent part of, or serving the cause of, national expansion. Finally, the particular nation states are not merely recipients and ultimate interpreters of the central case-law produced as the output of European juridical work, but additionally—through their strategic and tactical choices applied to their official commentaries and prelimi-

⁸⁰ To note: in the posthumous *Towards the Ontology of Social Being* by Lukács, social existence presumes the ability and factuality of exerting influence in the social total complex.

nary questions and inquiries submitted—they themselves can potentially become participants in, or even movers of the processes and thusly the constituent determinants of, the future of the community.

This is because the Union's Europe is about dynamism. For almost at least two decades we have been witnessing what is apparently the relentless seething of a *laboratoire vivant* fed by a certain *jacobinisme* activism.⁸¹ In this process we have the decisive force of the *raison économique* driving integration, which is supplemented, as *raison symbolique*, by other features as well, which are all derived and adopted from the spirit of the times, as, for example, the case may be with human rights in our situation, which in this scenario are serving as the background for the body of rules governing free trade and the free movement of goods, that is, features that function as props on the stage arranged according to the requirements of postmodern democracy.⁸² And let us not miss the point that both of these legal tiers directly effect our future: they hold the key to what is the true meaning of our membership in the European Union, thusly they have a lot to do with the chain of consequences defining the framework of our life. For—as termed by one of the past presidents of the European Court—„Qui participe à la Communauté épouse son droit”.⁸³

So the final outcome of our analysis is that there is no natively European law. So far we have member state nations, and currently it is only their cyclically renewed consensus (which is ideally reached via mutual compromise) that can produce the European law. They can do this in a community of nations in which each and every participant is nominally equal. Yet in practice, however, their particular size, economic wealth, and, last but not least, their level of sophistication in terms of being cultured (well versed, fluent) in the ways of Europe renders (promotes or demotes) them players with differing chances of success amid the continuity of challenges and contests. Their skilfulness, endurance, focus, and tactical affinity are being tested all the time. There are of course no losers *per se*, only players whose interests are forced from the fore. Those statehoods and nations behind them are destined for such less favourable track, which have proved to be less proactive in terms of keeping even their own dynamism alive. Or, it proves to be true and concludable in all its feasible directions to claim that

⁸¹ Arnaud *Pour une pensée juridique européenne* [note 10], p. 293.

⁸² *Ibid.*, p. 294.

⁸³ From the speech of President Robert Lecourt (1967–1976) in celebration of the 20th year of the Declaration by Robert Schuman in Brussels on 5 May 1970.

“If the »new legal order« is to have reality and full meaning it cannot be simply the extension of any one constituent system to a broader field of application.”⁸⁴ Instead, what we have here is the sum total of all parts, wherein only that gets included which had previously been released into the common stream of the common procedure with appropriate care and determination.⁸⁵

⁸⁴ J. D. B. Mitchell ‘British Law and British Membership’ *Europarecht* 6 (1971) 2, pp. 97–118 at p. 98.

⁸⁵ A research partly carried out and translated thanks to and within the Project K62382 financed by the Hungarian Scientific Research Fund.

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